Sanderson Farms, Inc. *and* International Chemical Workers Union, AFL-CIO. Cases 15-CA-7303 and 15-CA-7389

6 September 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 22 January 1981 Administrative Law Judge James M. Fitzpatrick issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in bargaining with the Union without an intention of entering into a collective-bargaining agreement, and that a strike which commenced on 27 February 1979 was caused and prolonged by the Respondent's bad-faith bargaining. He further found that the Respondent's subsequent withdrawal of recognition from the Union and its unilateral institution of a wage increase additionally violated Section 8(a)(5) and (1) of the Act. We disagree with the judge's finding that the Respondent bargained in bad faith, but we agree with his conclusion that the Respondent unlawfully withdrew recognition from the Union and unlawfully raised wages without bargaining with the Union.

The Respondent, a wholesale processor and distributor of poultry, employed at the time of the operative facts in this case approximately 390 production and maintenance employees at its Laurel, Mississippi poultry processing and rendering plant. These employees have been represented by the International Chemical Workers Union since 1972, when that Union was certified following a Board-conducted election. The Respondent and the Union, in the form of the International Union and "its agent" Local Union No. 882, thereafter entered into two collective-bargaining agreements, the first covering the period from 5 February 1973 through 4 February 1976, and the second from 23 February 1976 through 26 February 1979.

In April 1978, prior to expiration of the second contract, the Respondent's representative, Joe Sanderson Jr., contacted the International Union representative, Hubert Mills, who had negotiated and was responsible for administering the contract for the International, and offered to extend that contract from 26 February 1979 to 30 September 1980, with an approximate 50-cent-per-hour wage increase to be phased in over that time period. Mills and Regional Vice President Harley Thomas of the International Union, whom the Respondent also consulted regarding the proposal, informed the Respondent that the proposal was fine with them if the local agreed to it. Sanderson then spoke with local president William Magee, who brought along two employees to hear the Respondent's proposal, and received a favorable reaction to the proposal from the local delegation. Sanderson was subsequently informed by Magee, however, that at a local union meeting in June, which was attended by seven members, the contract extension proposal had been rejected by a vote of four to three. Although Magee again presented the proposal at the local's July meeting, only five members were present at that time, and that was not enough to act on the proposal.

Subsequently, on 30 November 1978 the Union sent the Respondent a letter seeking negotiations on a third contract, and the parties agreed to meet for the first session on 7 February 1979.[1] Sometime prior to that first meeting, Sanderson inquired of Mills whether he "expected anything hot" in the negotiations, and was told that Mills had met with the local members, that they had not suggested any contract proposals, and that wages would be the major issue.

When the parties met on 7 February, Mills presented an extensive new contract proposal which was essentially based on proposals which he had made 3 years earlier in negotiating the expiring collective-bargaining agreement. The Union had, in that instance, agreed on provisions substantially different from those it initially proposed in reaching that contract accord. This first meeting was entirely consumed by Mills' presentation of the Union's proposal and his explanation of the changes sought. In reply, the Respondent's chief negotiator, attorney Andrew Partee, advised that the Company would have to go through and analyze the document before making any responses. Partee noted that the Respondent had been thinking basically in line with the old contract.

On 20 February the parties again met and, at Mills' suggestion, began reviewing the Union's proposal to determine if there were specific provisions on which they could agree. Partee had begun the meeting by stating that the Company could not re-

[1] Unless otherwise indicated, all dates hereafter are 1979.

spond to the Union's proposal because Mills had rewritten the entire contract, but the parties then proceeded to reach agreement on part or all of three of the eight union proposals discussed. At the end of that bargaining session, Mills attempted to persuade the Respondent to extend the old contract while negotiating for the new one. This the Respondent refused to do.

At a local union membership meeting on the evening of 20 February Mills told the employees that he felt the Company was not bargaining in good faith. The membership thereupon authorized a strike, leaving it to the negotiating committee to effectuate that action when and if it saw fit.

The parties met one additional time, on 24 February, before the 26 February contract expiration. They were assisted on that occasion by the Federal Mediation and Conciliation Service, which had been called in by Mills because the existing contract was expiring prior to the next scheduled meeting. Partee stated that the Respondent could not address all the issues which the Union had placed on the table since, he asserted, they included 106 changes from the existing agreement. He indicated that the Company was willing to negotiate within the framework of the old contract and to consider minor changes proposed by the Union. The mediator separated the parties into different rooms and discussed a possible extension of the old contract, but the Respondent adhered to its position of 20 February that it would not extend the contract and no agreements were reached. On 27 February, the day after the contract expired, the local committee decided to strike and did so in midshift of that day.[2]

The only evidence the judge found of company bad-faith bargaining on substantive topics prior to the strike was what he regarded as the Respondent's 20 February inflexibility in not acceding to the Union's proposed grievance procedure and arbitration provisions which, he commented, involved only minor points. He further found, however, that the Company's hardening and shifting of positions in refusing to extend the terms of the expiring agreement during continuing contract negotiations, when the Respondent had itself originally requested an extension, also evidenced a desire to avoid agreement. Thus, he concluded that this, together with the Company's inflexibility on the grievance and arbitration issues, warranted the finding that the Respondent was not bargaining in good faith and that the strike engaged in by the employees on 27 February was an unfair labor practice strike from its inception.

The Respondent, in its exceptions, argues that the judge incorrectly found bad-faith bargaining after only two bargaining sessions. The first meeting was occupied exclusively with the Union's presentation of its extensive new proposals, and in the second session the parties did not even get through the majority of the provisions in order for the Company to state its response to the proposals. Only 8 of the contract's 23 articles were discussed. With respect to the judge's conclusion that the Respondent bargained in bad faith by refusing to extend the expiring contract, the Respondent denies that it at any time shifted or hardened its position on continuing the status quo during the continuing negotiations, claiming that it was justified in not agreeing to a specific contract extension during that time. The Respondent further asserts that it had itself wanted a new agreement extending existing contract provisions with wage increases beginning in 1978, that Mills had as late as December 1978 indicated that there were no contract problems and that wages would be the only real issue, and thus that its initial approach that the existing contract was a viable basis for negotiating the new agreement was reasonable.

We agree with the Respondent that the judge's finding of bad-faith bargaining cannot be sustained. In ruling on an allegation that a party has bargained in bad faith, we base our finding of either good- or bad-faith bargaining on the totality of circumstances reflecting the respondent's bargaining frame of mind. *Rhodes-Holland Chevrolet Co.*, 146 NLRB 1304 (1964). An employer's proposals are sometimes such that we have found that they may be characterized as "unusually harsh, vindictive, or otherwise unreasonable" and therefore "may be deemed so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith."[3] Here, however, when the Respondent would have essentially adhered to the terms of its past contract with the Union, its proposals cannot be so construed. In addition, when the Respondent initially proposed extending the expiring contract for approximately 19 months with a raise in wages, union representatives voiced no objections to terms other than wages which might have alerted the Respondent that no agreement could be reached unless major changes were effected. Further, there were only two bargaining sessions and the Respondent had not yet had an opportunity to respond to the Union's entire new proposal. The Respondent's mere refusal to extend the

[2] The parties continued bargaining during the strike until 5 June, when a decertification petition was filed. They engaged in a total of 13 bargaining sessions.

[3] *Chevron Chemical Co.*, 261 NLRB 44, 46 fn. 10 (1982).

old contract cannot constitute sufficient evidence to establish bad-faith bargaining for a new agreement. Therefore we cannot agree with the judge that the evidence is sufficient to warrant a finding that, commencing from 20 February, the Respondent negotiated with the Union without an intention of entering into a final or binding collective-bargaining agreement.

Nor does there appear to be a later point at which the Respondent's bargaining demonstrated bad faith. While the judge relied on aspects of the Respondent's conduct in 5 other of the parties' 13 bargaining sessions in concluding that the Respondent bargained in bad faith, those findings are rebutted when considered in the totality of circumstances.

The judge concluded that the Respondent's conduct in the 28 March bargaining session of only criticizing, rather than suggesting some modification of the Union's proposal to remove the limits on the number of employees on the grievance committee,[4] evidenced a purpose to avoid agreement. The facts do not support that conclusion. Before that session, this proposal had been referred to only once, at the 20 February meeting, and then only in passing with the Union merely asking for approval of the proposal and the Respondent simply replying it could not agree to it. Neither party attempted to justify its position concerning the proposal, and there was uncontradicted testimony that the grievance committee was not even used during the term of the expired contract. In these circumstances, the judge found that the Union's proposal "was unrelated to a specific labor relations consideration and was instead related to union prestige," and that "the Company's conduct on this point did not evidence bad faith." Because there was no real discussion of the Union's proposal on 20 February and no bad faith in the Respondent's conduct on that date, and because the Union presented the proposal without change at the 28 March meeting, we find no basis for concluding that the Respondent's conduct demonstrated bad faith.

Similarly, the judge concluded that the Respondent on 10 April evidenced a tactic of surface bargaining for the purpose of avoiding agreement on management rights, as well as by rejecting a union proposal on compensation for probationary employees. With respect to the Respondent's adherence to its position that it wanted the management-rights clause contained in the parties' prior contract, the Respondent was of course under no obligation to make a concession on this issue at that time, and would not appear to be attempting to avoid agreement by taking a position that it wanted a clause which had previously resulted in agreement. With respect to the Respondent's rejection of the Union's proposed wage increase for probationary employees, the Union had not submitted an overall wage proposal or economic package, and the parties had agreed to defer consideration of all economic topics until other contract terms were settled. Since no overall wage demands had been made by the Union, it would not seem necessary for the Respondent to extensively justify a rejection of a proposed increase for one small segment (probationary employees) of the bargaining unit prior to being presented with a general wage proposal.

The judge's conclusion that the Respondent revealed an intransigent attitude and unwillingness to reach agreement by its bargaining regarding restroom relief at the 18 and 19 April sessions is likewise rebutted by the fact that, at the very next meeting on 1 May, the Respondent presented a proposal on that matter which was accepted by the Union. Finally, we also disagree that the Respondent's 15 May bargaining about regular breaks evidenced unwillingness to reach agreement, since the parties were presenting written proposals and counterproposals on the subject during that meeting and neither was obliged to accept the other's.

In sum, we find that, although both parties engaged in hard bargaining, none of the incidents relied on by the judge rises to the level of bad faith in the total circumstances of this case. Nor can we find anything in those incidents' combined effect which establishes bad faith. Rather, it simply appears that the Respondent had previously obtained what it regarded as an advantageous contract and was reluctant to give up those provisions the Union had earlier been willing to grant.

The General Counsel in his exceptions asserts, inter alia, that the judge erred in failing to find that the Respondent also engaged in surface bargaining by insisting to impasse on a no-strike clause preventing employees from striking in protest of unfair labor practices. We find, however, that the parties in this case never reached a bargaining impasse. All items on which the parties have not agreed are not necessarily items causing an impasse; mere discussion of unresolved items falls short of unlawful, persistent demands to the point of impasse.[5] Here,

[4] The parties' previous contract had provided for three union members of a grievance committee.

[5] *Seattle-First National Bank*, 241 NLRB 753 (1979). While counsel for the General Counsel in the brief attached to his exceptions cited this case in support of his position that insistence on a no-strike clause which forbade striking even in protest of the respondent's unfair labor practices is a nonmandatory subject of bargaining, quoting portions of administrative law judge's decision in the case to that effect, the Board itself found that the respondent there did not insist to the point of impasse and therefore

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the Respondent continued to meet and bargain in an effort to reach a contract accord until union representative Levine walked out of the 5 June meeting. The Respondent thereafter refused to participate in further bargaining sessions, even though the Union sought them, due to the 5 June filing of a decertification petition. Given the fact that these intervening events prevented the parties from, for example, ever discussing wages and other important economic issues, we cannot conclude that the parties ever reached a bona fide bargaining impasse prior to the cessation of bargaining. Therefore, we find no merit in this exception.

Accordingly, we shall dismiss the portions of the complaint alleging that the Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act.

Having rejected the judge's conclusion that the Respondent's bargaining conduct was violative of the Act, we next consider the lawfulness of the Respondent's actions following the 5 June filing of a decertification petition. Under the holding of *Telautograph Corp.*,[6] 199 NLRB 892 (1972), an employer faced with a valid decertification petition was required to suspend bargaining for a new contract with an incumbent union until the question concerning representation raised by that petition had been settled by the Board. Here, the decertification petition was dismissed by the Regional Director for Region 15 on 5 July, on the basis that the pending charge alleging bad-faith bargaining had been administratively determined to have merit and precluded the appropriate raising of a question concerning representation until unfair labor practices were remedied and for a reasonable time thereafter.[7] We have, however, decided that the unfair labor practice charge and complaint did not have merit, and thus conclude that the Respondent, in the absence of any other unlawful conduct on its part, was privileged to suspend bargaining for a new contract until the merits of the unfair labor practice charge had been determined by the Board.[8] The Respondent, however, did much more than merely suspend bargaining for a new contract; by letter of 9 August it completely withdrew recognition from the Union. This it was not privileged to do.

In its 9 August letter informing the Union of its decision to withdraw recognition from the Union, the Respondent cited a number of factors on which it claimed to base a doubt of the Union's continued majority status. The primary ground relied on was the filing of the decertification petition which, the Respondent asserts, was supported by approximately two-thirds of the employees then working in the plant.[9] The Respondent admits that, in calculating the percentage of employee support for the decertification petition, it excluded the striking employees from consideration on the assumption that no election would be held within a year of the 27 February strike and the strikers would not then be eligible to vote.[10]

Had a majority of the Respondent's employees signed in support of the decertification petition, the Respondent would have had a reasonable ground for doubting the Union's continued majority status.[11] The 5 June decertification petition was not, however, a majority-supported petition. The list of employees as of the pay period ending 2 June which was submitted to the Region by the Respondent for the purpose of checking the showing of interest for the petition contained 377 names. The Respondent introduced this list into evidence and, while counsel for the General Counsel stated that he could not verify that that list was complete and contained the names of all striking employees, it is apparent from the list that there were at least 377 unit employees in the pay period immediately preceding the filing of the 5 June petition. The 151 signers are less than a majority of 377.

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did not pass on the issue of whether or not it was a mandatory subject of bargaining. Similarly, here, since we find there was no impasse, we need not pass on whether the Respondent could lawfully insist to impasse on a provision forbidding strikes in protest of the Respondent's unfair labor practices.

[6] During the interim between the occurrence of the operative facts in this case and our consideration of their legal effect, the Board has reversed existing precedent with respect to an employer's bargaining obligations on being presented with a valid decertification petition. See *Dresser Industries*, 264 NLRB 1088 (1982). In so doing, however, the Board refrained from giving its newly announced rule retroactive application. We shall likewise here judge the lawfulness of the Respondent's conduct in accordance with the applicable Board law at the time of its occurrence.

Chairman Dotson was not a member of the Board when *Dresser Industries* was decided. His participation in this case should not be viewed as an approval of the decision in *Dresser Industries*.

[7] Chairman Dotson and Member Hunter note that, contrary to the Regional Director, they would not have dismissed the decertification petition simply because an unfair labor practice complaint had issued against the Respondent.

[8] Since we are finding that the charge had no merit, it follows that the petition was not blocked by a meritorious charge, and it would be unfair to find an employer violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain in the face of an unmeritorious charge which caused the petition to be dismissed. Therefore, the Respondent would have been privileged to act as though the petition were still pending and to have suspended bargaining over a new contract under the holding of *Telautograph Corp.* Like an employer who changes terms and conditions of employment during the pendency of election objections where the union is eventually certified, the Respondent acted at its peril in so doing. Cf. *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974).

[9] The judge erroneously states that 377 employee signatures were filed as a showing of interest with the decertification petition, whereas the record reveals that the petition was supported by only 151 signatures.

[10] The Respondent noted that, under Sec. 9(c)(3) of the Act, economic strikers are eligible to vote for only a year after the commencement of a strike.

[11] *Dresser Industries*, 264 NLRB 1088 (1982); *Massey-Ferguson, Inc.*, 184 NLRB 640, 641 (1970); *Wabana, Inc.*, 146 NLRB 1162, 1171 (1964).

At the time the Respondent withdrew recognition, the striking employees were eligible voters. The Respondent was, therefore, not justified in withdrawing recognition from the Union on the basis that a majority of the unit employees had signed in support of the decertification petition. Nor was the Respondent justified in withdrawing recognition on the basis of other factors cited in its 9 August letter—dwindling employee strike support as indicated by a diminishing number of employees on the picket line, and alleged union bargaining intransigence. As properly found by the judge, picket line inactivity does not establish a change of view about union representation or rebut the presumption of continued majority status,[12] nor is the union's alleged intransigence at the bargaining table relevant to whether it has the continued support of the employees. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on 9 August, and thereafter refusing to recognize and bargain with it. It follows that we also agree with his conclusion that the Respondent further violated that section of the Act by announcing and implementing a wage increase without bargaining with the Union.[13]

With respect to the status of striking employees, as stated, we disagree with the judge's finding that the 27 February strike was an unfair labor practice strike from its inception. We find, rather, that the strike commenced as an economic strike. Whether the strike converted to an unfair labor practice strike when the Respondent withdrew recognition from the Union and unilaterally changed wages depends on whether those unfair labor practices had the effect of prolonging the strike. We find that they did. What had previously been only a strike to force the Respondent to agree to economic terms was of necessity converted to a strike to force the Respondent to grant to the Union the recognition to which it was entitled. None of the issues facing the parties could be resolved in any way absent the Respondent's recognition of the Union. Obviously, the strike in these circumstances could not be terminated until the Respondent was willing to accord recognition to the Union. Therefore, we conclude that the strike became an unfair labor practice strike on 9 August when the Respondent withdrew recognition and informed the Union that it was unilaterally changing wages. We shall, accordingly, order the Respondent to reinstate unfair labor practice strikers on their unconditional offers to return to work.

[12] Chairman Dotson and Member Hunter find that picket line inactivity should be considered as a factor in determining whether the Respondent was justified in withdrawing recognition from the Union under *Telautograph Corp.*, supra. See *Stoner Rubber Co.*, 123 NLRB 1440, 1443–44 (1959). However, they agree that, under all the circumstances of this case, the Respondent's withdrawal was not justified. Member Zimmerman notes that *Telautograph Corp.* does not speak to the question of withdrawal of recognition, but only to the question of a refusal to continue to bargain for a new collective-bargaining agreement during the pendency of a decertification petition.

[13] As noted, under *Telautograph*, the Respondent may have been relieved of its obligation to bargain with the incumbent Union with respect to the terms of a new collective-bargaining agreement, but the suspension of that bargaining obligation did not suspend its obligation to consult with the employees' bargaining representative before making changes in existing terms and conditions of employment. *Flex Plastics*, 262 NLRB 651 (1982).

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. All production and maintenance employees of the Respondent at its Laurel, Mississippi poultry processing and rendering plant, including shipping and receiving employees and cafeteria employees, but excluding all office clerical employees, salesmen, over-the-road truckdrivers, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. The Union and the Local are labor organizations within the meaning of Section 2(5) of the Act.

4. At all times since 9 June 1972 the Union has been the representative for purposes of collective bargaining of a majority of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from the Union on 9 August 1979 and thereafter refusing to recognize and bargain with the Union regarding any changes in terms and conditions of employment, the Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By announcing on 10 August 1979 and by implementing on 12 August 1979 a 20-cent-per-hour across-the-board wage increase affecting employees in the aforesaid appropriate unit without affording the Union an opportunity to negotiate and bargain as the exclusive representative of employees in the unit, the Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. A strike in which the employees of the Respondent in the appropriate bargaining unit were engaged from 27 February 1979 was prolonged by the Respondent's unfair labor practices commencing on 9 August 1979, and was thereafter an unfair labor practice strike.

8. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

We have found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union when it was not justified in doing so, and by unilaterally implementing wage increases without bargaining with the Union. To remedy these violations we shall require the Respondent to cease and desist from its unlawful conduct and to recognize and bargain, on request, with the Union with respect to any changes in rates of pay, wages, and other terms and conditions of employment.[14]

We otherwise adopt, with the following exceptions, the provisions of the judge's recommended remedy with respect to the reinstatement and making whole of unfair labor practice strikers. The judge included in his recommended remedy a requirement that the Respondent make whole striking employees for any loss of earnings they may suffer as a result of the Respondent's refusal, if any, to reinstate them in a timely fashion, "by paying to each of them a sum of money equal to that which each would have earned as wages during the period commencing 5 days after the date on which each unconditionally offers to return to work . . . ." The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. *Drug Package Co.*, 228 NLRB 108 (1977). However, if the Respondent has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the date of the unconditional offer to return to work. *National Car Rental System*, 237 NLRB 172 (1978). Further, we shall modify the order to take into account our finding that the strike began as an economic strike and was converted to an unfair labor practice strike on 9 August 1979.

ORDER

The National Labor Relations Board orders that the Respondent, Sanderson Farms, Inc., Laurel, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Chemical Workers Union, AFL-CIO, as the certified collective-bargaining representative of the employees in the following described unit, by withdrawing recognition from that Union and by making unilateral changes in wages or other terms and conditions of employment:[15]

> All production and maintenance employees employed by Respondent at its Laurel, Mississippi, poultry processing and rendering plant, including shipping and receiving employees and cafeteria employees; excluding all office clerical employees, salesmen, over-the-road truckdrivers, watchmen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union and bargain, on request, with the Union with respect to any changes in rates of pay, wages, and other terms and conditions of employment.

(b) Offer, on application, to all the employees engaged in an unfair labor practice strike who were not permanently replaced while economic strikers, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after 9 August 1979, when the economic strike was prolonged and converted into an unfair labor practice strike.

(c) Make each of the striking employees whole for any loss of earnings they may suffer by reason of the Respondent's failure, if any, to reinstate them, upon application, in the manner set forth in the section of this decision entitled "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[14] Further, in view of our finding that the decertification petition was improperly dismissed, it is subject to reinstatement and an election can be directed after the Respondent's unfair labor practices are appropriately remedied.

[15] Provided, however, that nothing herein shall be construed as requiring the Respondent to vary or abandon any economic benefit heretofore established.

(e) Post at its plant in Laurel, Mississippi, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all other allegations of the complaint to which no violations have been found are dismissed.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to bargain collectively with the International Chemical Workers Union, AFL-CIO, as the collective-bargaining representative of the employees in the unit described below, by withdrawing recognition from that Union.

WE WILL NOT unilaterally, and without consultation with the International Chemical Workers Union, AFL-CIO, give our employees wage increases, provided, however, that nothing herein shall be construed as requiring us to abandon or rescind any wage increase we have previously given.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively and in good faith on request with that Union with respect to any changes in rates of pay, wages, and other terms and conditions of employment of the employees in the appropriate unit described below.

WE WILL offer, on application, to all our employees engaged in an unfair labor practice strike, who were not permanently replaced while economic strikers, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements hired on or after 9 August 1979, when the economic strike was prolonged and converted into an unfair labor practice strike.

WE WILL make each of these striking employees whole for any loss of earnings they may suffer by reason of the failure, if any, to reinstate them, upon application, plus interest. The appropriate bargaining unit is:

> All production and maintenance employees employed by the Employer at its Laurel, Mississippi, poultry processing and rendering plant, including shipping and receiving employees and cafeteria employees; excluding all office clerical employees, salesmen, over-the-road truckdrivers, watchmen, guards and supervisors as defined in the Act.

SANDERSON FARMS, INC.

DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Administrative Law Judge. In this case the key issue is whether the Company engaged in surface bargaining with the Union, that is, bargained with a purpose of not reaching agreement. As more fully set out below, I find that was its purpose.

The present proceedings under Section 10(b) of the National Labor Relations Act (the Act) began initially with unfair labor practice charges filed May 29, 1979,[1] in Case 15-CA-7303 by International Chemical Workers Union, AFL-CIO (the Union), against Sanderson Farms, Inc. (the Company or Respondent). Based on these charges a complaint issued July 16 alleging Respondent had engaged in bad-faith bargaining and thereby committed unfair labor practices proscribed by Section 8(a)(1) and (5) of the Act. On August 29 the two cases were

[1] All dates are in 1979 unless otherwise indicated.

consolidated. Respondent answered each complaint, admitting jurisdictional allegations as well as certain factual allegations, but denying its conduct amounted to violations of the Act. The first issue posed is whether the bargaining between the Union and the Company beginning February 7 involved surface bargaining, the complaint alleging that the Company bargained in bad faith in violation of Section 8(a)(1) and (5) of the Act, and the answer asserting that the Union bargained in bad faith. A second issue, dependent on the first, is whether a strike of employees beginning February 27 was caused or prolonged by company unfair labor practices. Additional issues are whether the Company, by withdrawing recognition from the Union on August 9, and by shortly thereafter granting a general wage increase without giving the Union a chance to bargain about it, further violated Section 8(a)(1) and (5) of the Act. The issues were tried before me at Laurel, Mississippi, on October 29, 30, and 31.

Based on the entire record, including my observation of the witnesses, and on consideration of the briefs filed by the General Counsel and the Company (the Union did not submit a brief), I make the following

FINDINGS OF FACT

I. THE EMPLOYER

The Company, a Mississippi corporation, has, since 1956, been engaged at Laurel, Mississippi, and elsewhere in the processing and wholesale distribution of poultry. The Laurel operation, the only facility involved in this matter, receives live broilers, slaughters them, processes them, packs them, and distributes the product. At the time of the events involved here, the Company employed approximately 390 production and maintenance employees (mostly women) and operated two shifts processing approximately 90,000 broilers per day at the rate of 7600 birds per hour. The key equipment is a conveyor line which operates continuously. From the time a bird is hung on the conveyor line at the start of the operation until the process is completed, approximately 1 hour elapses. The entire operation is under surveillance by United States Department of Agriculture inspectors who have authority to shut down the line at any time.

It is undisputed that the Company is engaged in interstate commerce. During the calendar year, preceding issuance of the first complaint, it received at its Laurel plant directly from points outside Mississippi goods and materials valued over $50,000, and also sold and shipped from that plant to points outside Mississippi products valued over $50,000. I find it is engaged in interstate commerce.

II. THE LABOR ORGANIZATIONS INVOLVED

It is undisputed that the International Chemical Workers Union (the Union) and its Local Union 882, both labor organizations, have for several years had an established collective-bargaining relationship with the Company. On June 19, 1972, the Board certified the Union as the exclusive representative of the Company's production and maintenance employees at the Laurel, Mississippi poultry processing and rendering plant, including shipping and receiving employees and cafeteria employees, but excluding office clerical employees, salesmen, over-the-road truckdrivers, watchmen, guards, and supervisors as defined in the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Past Labor Relations*

Following the certification in 1972, the Company on the one hand and the Union and its agent, Local 882, on the other negotiated a first collective-bargaining agreement for employees in the certified unit covering the 3-year period from February 5, 1973, through February 4, 1976.

On March 5, 1976, the same parties agreed on a second contract for the period from February 23, 1976, through February 26, 1979. This second agreement tracked the format of the first but included some significant revisions. Thus, the second agreement contained revisions of provisions governing union representation, checkoff, grievance procedures, arbitration, union bulletin board, employee seniority, working conditions, leaves of absence, wage classifications, holidays, vacations, group insurance, employee pension plan, the effect of Federal and state laws on the agreement, and wages. Articles which remained unchanged included those dealing with recognition of the Union, antidiscrimination, management functions, no strikes or lockouts, probationary period for new employees, safety and health, notification, and bargaining respecting the effects of contracting out unit work, and duration of the agreement. In sum, the negotiations resulted in substantial changes from the prior agreement but used the old instrument as the basis for (a) continuing in effect those provisions on which there was no disagreement and (b) discussing topics on which the parties differed but on which they ultimately reached agreement.

B. *The Negotiations for a Third Contract*

1. Initial session—February 7

On November 30, 1978, the Union sent the Company a letter seeking negotiations for a third collective-bargaining agreeement. The Company acceded to the request and the parties met on February 7, 1979, for the first of 13 negotiating sessions, all in Laurel, Mississippi.[2] Sometime prior to the first meeting, Joe Sanderson Jr., who at the time of the hearing was assistant to the director of operations for three of Respondent's plants, and had been involved in negotiations for the prior contracts, spoke with Hubert Mills, the Union's International representative, about arranging the meeting. He asked Mills if he "expected anything hot" in the negotiations. Mills said he had met with local union members and they had not suggested any proposals. He indicated that wages was the important problem.

[2] The General Counsel disclaims any contention that the Company violated the Act by failing to meet on appropriate occasions.

a. *The union proposal*

It is evident that when negotiations commenced on February 7 both parties approached bargaining from widely separated positions. The Company, being content with the existing agreement, expected to again use it as a basis for negotiating revisions respecting particular problems arising under the old contract, and it maintained this posture throughout the negotiations. By contrast, the Union sought drastic changes, an essentially different contract. The bargaining which followed did not substantially narrow the gap between these positions.

At the February 7 session the Company was represented by its attorney, Andrew Partee, assisted by Joe Sanderson Jr., and the Union by Mills assisted by a local committee. Since 1974 Mills had been assigned by the International to a large area, which included Laurel, and had served the Local and the employees at the Sanderson plant, including the negotiations for the second agreement about to expire. International Representative Clyde Johnson had represented the Union in negotiating the first contract in 1972. Partee had represented the Company in the 1972 negotiations and one of his partners, Frederick Kullman Sr., had served that function in negotiating the second contract.

On February 7 virtually no give-and-take bargaining occurred. Mills opened the meeting by distributing copies of the union proposal which at this and subsequent meetings was the basis for discussion. Partee stated that, for the most part, he would not be taking positions at the first meeting respecting the Union's proposal because he wanted time to consider it. At this first meeting Mills orally reviewed the proposal, comparing it with the old contract and noting similarities and differences, as well as his reasons for changes. His proposal, which he testified was based on his proposals made 3 years earlier in negotiating the second contract, made a complete package of contractual language on desired topics, with the exception of insurance and pension plan which were to be dealt with by some yet-to-be-stated upgrading of provisions in the old agreement, and also no wage proposal was included. The proposal varied significantly from the old contract on many topics including the recognition clause, union representation, checkoff, management-rights, grievance procedures, arbitration, no-strike/-no-lockout provisions, probationary period for new hires, seniority, working conditions, leaves of absence, safety and health, entirety of the agreement provision, and duration of the contract.

Union Recognition. On the matter of company recognition of the Union, the proposal deleted section 2 of the existing contract which limited recognition of the Union's representative capacity to employees and not to work. Mills argued that the old section 2 prevented the Union from representing the employees in accordance with the Board certification. He said, "we could not agree to that type of language any longer, and we didn't feel like any union within its right mind would agree to that type of language . . . ." He did not explain why the Union had changed its mind about language it had agreed to for the past 6 years.

Union Representation. On the matter of union representation, the proposal removed all existing restrictions on the number of shop stewards and grievance committeemen to be appointed and certain limits on access of union officials to the plant. The old contract provided for a maximum of 7 stewards for a one-shift operation and 10 for a two-shift operation, and for 3 union members of a grievance committee. Mills argued that on occasion there had been insufficient stewards to cover the shifts and that the Union should not be limited in the number of stewards and grievance committeemen it could appoint. He objected to having his own access to the plant limited to grievance investigations and also to the requirement that a company official accompany him. The proposal also provided that employees engaged in processing a grievance should be paid for the time spent. Mills asked Partee if they could agree. Partee indicated he was not agreeing to any language during that session. I find he was not disagreeing but rather was deferring his response to a later time.

Checkoff. The checkoff proposal reduced the opportunity for employees to withdraw authorization from twice a year to once a year. The old provision set forth the form to be supplied by the Union and used by employees in authorizing checkoff. Mills explained that the International had a differently worded form which it would supply to the Local. The union form would allow for fewer opportunities to revoke checkoff authorization. Mills proposed there be no contract language on revocation, that it be governed solely by the wording of the Union's authorization form. He did not indicate on what basis, if any, the form could be changed. Apparently no further discussion of the proposal occurred at that meeting.

Management-Rights. The proposal on management-rights was a substantial change. In the old contract, management-rights were spelled out with great particularity. The proposal entirely eliminated the existing provision, substituting in its place a three-sentence provision allowing the Company to discharge or discipline employees for just cause, requiring presence of a union representative in the event of written reprimand, suspension, or discharge, and limiting the effect of written reprimands to a period of 6 months.

Mills said the Union had had too much trouble during the last contract with management-rights. He contended that under the old provision the Union had given back to the Company all the employee rights it was certified to protect, making it impossible for the Union to represent the employees. He cited various working conditions and incidents of discipline to support his argument. He particularly objected to management's right to assign personnel, which he said should be governed instead by seniority. Partee interjected, "Well, you realize we're not going to sign any contract without a management-rights clause. We've got to have our management rights clause." Mills replied, "Well, that's the problem, because we may have some real problems here with the one you've got in here." Thus, on this crucial topic, they were poles apart from the beginning of negotiations.

Grievance Procedures. As to grievance procedures, the proposal broadened the definition of grievance from a dispute as to the interpretation or violation of a specific

provision of the contract to "any difference . . . between the Company and the Union or its members as to the interpretation, application or operation" of the agreement. Mills argued that the procedures should be broad enough to handle any problem. The proposal also deleted the existing ban on work stoppages pending resolution of a grievance except in the event of a clear and present danger to health or safety. Mills contended that, in view of the general no-strike clause in the contract, there would be no need to include a ban on work stoppages in the grievance procedure language. Partee declared there was a need to explicitly prohibit slowdowns and the Company wanted the prohibition in the grievance language where employees would see it. Neither noted that, in contrast to the proposal, the old contract provided an exception to the no-strike clause in the event of hazards to health or safety.

The proposal on grievances also enlarged the time period in which to file a grievance from 5 days to 10 and required the Company to grant grievances which it did not answer within a prescribed time limit. Mills stated there had been numerous situations which had come to light too late to grieve within the short 5-day limit. Enlarging the filing time to 10 days, he said, would be more reasonable. Also, to require the Company to answer on time or be penalized by having the grievance granted would, according to him, be more evenhanded.

Arbitration. The proposal respecting arbitration would change the old clause in various minor respects. But, more significantly, it would eliminate existing restrictions on the authority of an arbitrator to decide matters within the management-rights provisions or matters of past practice, or to award backpay for a period prior to the filing of the written grievance. The old contract allowed 30 days in which to appeal a grievance to arbitration, except for grievance in which financial liability was accruing, which had to be appealed within 10 days. Regarding this latter time limit, Mills stated that because the Local had to vote on whether to take a matter to arbitration, 30 days were needed in all instances. He argued against continuation of the limitations on arbitrable subjects, stating that, considering the existing provisions on recognition, management-rights, grievance, and arbitration procedures, seniority, and the so-called zipper or entire agreement clause, the Union was powerless to do anything for employees. He said those clauses had to be changed. He also proposed dropping the American Arbitration Association as a source for arbitrators because of the expense and delay involved.

Bulletin Board. With respect to union use of a plant bulletin board, Mills proposed eliminating the existing requirement that advance approval of a posting be obtained from the Company's division manager. He said it was not right to require such approval for routine notices.

No-Strike/No-Lockout. The proposal respecting strikes and lockouts differed substantially from the old contract. The old provision categorically banned strikes, walkouts, slowdowns, sitdowns, picketing, or other activity designed to interfere with operations for any reason. In the proposal, the ban on strikes or similar activities applied only to those in support of a change in the contract or a grievance subject to arbitration. Mills argued the old contract forbade even strikes to protest unfair labor practices by the Company. The proposal, he said, eliminated this limitation. The proposal also would waive the Company's right to claim damages from the Union for breach of the no-strike provisions, provided the Union actively encouraged a return to work and took all reasonable steps to notify employees of their no-strike obligations. In support of this latter proposal, Mills urged that the proposal, in requiring the Union to take all reasonable steps to get strikers back to work, was adequate and that the Union should not be liable for damages for all strike action because even nonunion employees could strike. He said the Company could protect itself from strikers by firing them. Partee responded that under the existing clause no court would hold the Union liable for damages if it took reasonable steps to end strike action.

Probationary Period. With regard to the probationary period for new employees, the proposal would reduce the existing 90-day probationary period to 30 days. Mills said 30 days should be enough time in which to determine an employee's ability to perform the unskilled work involved.

Seniority. On seniority, the proposal would eliminate management discretion in selecting employees for layoff, recall, or promotion and would require such action be according to seniority. Mills asserted that the old provisions left senior employees unprotected because management enjoyed unfettered leeway in determining employee qualifications to fill any job. The proposal also would eliminate the practice of short-term layoffs, from which Mills said senior employees were wholly unprotected.

Working Conditions. In the old contract, the topic of working conditions defined the workweek, hours of work, employee breaks, and showup and call-in pay. The proposal would substitute for this a series of topics entitled Workday and Workweek, Shift Premium, Overtime, Rest Periods and Plant Rules, which spelled out many more employee rights in considerably greater detail. It also would require the Company to assign employees returning from a leave of absence to their former position rather than to a pool of unassigned employees.

The proposal would also provide extra pay for second-shift employees and enhance overtime and weekend pay. Mills also proposed additional pay for unit employees assigned temporarily as foremen, and general wage increases in the form of an automatic override in the event of the increase in the Federal minimum wage laws. Partee commented that these latter proposals basically were economic topics which usually were deferred until other contract terms were settled. Mills then agreed to defer their consideration as economic topics. As it turned out, they never reached the economic topics.

Plant Rules. Mills then turned to his proposal that all plant rules be negotiated with the Union, as well as published for 1 week, prior to enforcement. Existing rules dealt with poor attendance, misconduct on the job, and discipline. Mills said those rules had caused trouble, citing instances of unwarranted discharge for absenteeism due to illness of the employee or in his family. Sanderson

responded to the effect that attendance was crucial to plant operations.

Leaves of Absence. Mills next addressed leaves of absence, urging that these provisions be liberalized. He proposed more equitable funeral leave, citing past incidents of inequity, and jury leave with regular pay, less the amount received for jury duty.

Holidays and Vacations. With respect to holidays and vacations, the proposal would make subtantial increases. But Mills deferred discussion on them on the ground they were economic in nature.

Insurance. He then turned to insurance, stating that the Union wanted improved insurance at company expense. His written proposal contained no specific proposal, stating only that he wished to discuss upgrading it when they reached the economic subjects.

Safety and Health. On the topic of safety and health, the old contract had a short provision that the Company must maintain safe and healthy conditions. The proposal would substitute for this an extensive 12-section provision specifying in detail practices to be followed to insure health and safety. Among other things, under the proposal, the Company would maintain accident records, and would maintain a joint labor-management health and safety committee which would meet monthly, make monthly inspections of the plant, recommend correction of unsafe conditions and practices, review and analyze all reports of industrial injury and illness, investigate the causes and recommend procedures for the prevention thereof, handle health and safety grievances, and promote health and safety education. This committee would be authorized to seek the advice of outside experts, including union representatives, and call them into the plant for examinations, investigations, and recommendations. The Company would inform the committee respecting substances used in the plant, exposure to which might be unhealthy or dangerous and, upon request of the Union, reveal the identity and nature of any substance used. The Company would also furnish medical service and facilities for diagnosis and treatment of injuries or afflictions caused in the plant. Union representatives on the committee would be allowed to leave their work in order to fulfill committee functions without loss of pay.

In support of the health and safety proposal, Mills stated that it was to implement a program of the International to upgrade health and safety clauses in local contracts. He said he would answer questions about that after Partee had a chance to read it.

Contracting Out Work. The old contract limited the Company's right to contract out work by requiring advance notice thereof to the Union and negotiation with it as to the effects of contracting out. It also forbade performance of bargaining unit work by supervisory employees if such would result in the layoff of an employee. Under the proposal the Company would categorically agree not to contract out bargaining unit work. Supervisors would not perform any unit work, and if they did, unit employees would be paid for the time spent in addition to their regular pay.

Miscellaneous. An additional miscellaneous proposal would require the Company to give each employee either a ham or turkey at Christmas. When Sanderson pointed out that the plant did not process ham or turkey, Mills changed his proposal to a chicken.

Entirety of Agreement. The old contract contained a section, referred to as the zipper clause, by which the parties agreed that all matters between them were settled by the contract whether or not dealt with in the document or discussed in negotiations. Mills proposed to delete this entirely on the ground that during the term of an agreement they should be free to bargain over anything they had overlooked.

Duration. As to duration of the contract, Mills proposed a 1-year term instead of the 3-year term of the old agreement.

b. *Status of negotiations at end of first session*

As of the end of the first meeting the Union had placed an extensive new proposal on the table. The parties agreed to separate out those matters involving "economics" and to defer consideration of them until after agreement was reached on noneconomic subjects. The matters thus put aside included wages, shift premium, overtime pay, temporary foreman pay, automatic override above Federal minimum wages, rest periods, holidays, vacations, paid leaves of absence, insurance, and pension.

Proposals remaining on the table dealt with the scope of company recognition of Union, union representatives, checkoff, elimination of management-rights provisions, grievance and arbitration procedures, union bulletin board, scope of the no-strike clause, probationary period for new employees, seniority, assignment of employees, plant rules, safety and health, subcontracting of work, performance of unit work by supervisors, vending machine profits, the zipper clause, and duration of the agreement. No agreement was reached on any of these topics during the initial session. At the close Partee told Mills, "Well, you've given us a whole lot here. We're going to have to go back and analyze this. We were thinking basically in line of the old contract." In context this was a statement of management's general approach rather than a counterproposal. They agreed to meet again on February 20.

Although it was apparent at the close of the first meeting that the union proposals differed substantially from the old contract, there were circumstances suggesting the Union might give ground on them. As already noted, Mills had indicated, prior to negotiations, that plant employees had no particular items in mind other than more money. There were, moreover, the background circumstances of the second contract being somewhat similar to the first even though the negotiations had started with proposals from Mills similar to those he was currently proposing. As of the end of the first session, and without considering any later events, the conduct of neither party demonstrated bad faith.

2. The second session—February 20

As the second session started on February 20, Partee stated that there was no way he could respond to the union proposals because Mills had rewritten the entire

contract. At Mills' suggestion, they then again began reviewing the entire union proposal, exclusive of economic items, considering each specific proposal to see on which they could agree.

Union Recognition. The first item considered was the proposal dealing with company recognition of the Union. It was identical to section 1 of the recognition article of the old agreement which contained two sections. The Company agreed to this old section 1 language. But the union proposal omitted the second section of the old article. Regarding this, Mills stated there was no way the Union could live with the old section 2, it being his view that in it, the Union had given up part of its responsibility, under the law, for representing employees. Partee responded that, although the Company might have considered omitting section 2 if it were not already in the existing contract, he feared that if it were now taken out, an arbitrator would construe the deletion as an effort of the parties to have the employer give up some (unspecified) right and, accordingly, he was insisting that the old section 2 be included. This amounted to a counterproposal of the old section 2 language. Mills did not agree. At his suggestion they put that issue aside.

Counsel for the General Counsel characterizes Partee's response in this matter as a meaningless answer. I disagree. Partee may have been overly careful, but his response was not meaningless. Moreover, his bargaining position was to retain an existing provision which, arguably, benefited management. In the circumstances his posture was at least reasonable, and his response as meaningful, as Mills' statement that there was no way the Union could live with a provision which in the past it had twice agreed to and had lived with for 6 years. Both parties gave reasons for their positions. See *Texas Industries*, 140 NLRB 527 (1963). Neither party made any effort at this meeting to reach a middle ground or to accommodate the apprehensions of the other. They simply put the matter aside as unresolved. As of that point, their conduct on the issue did not evidence bad faith.

Discrimination. Mills next turned to the proposed provisions banning discrimination, the language of which was the same as the old contract. Partee agreed to this proposal.

Union Representation. Mills then turned to his proposal relating to union representation, specifically the proposal that there be no limit on the number of shop stewards. The existing provision limited the number of stewards to 7 for a one-shift operation and 10 for a two-shift operation. Mills opened the discussion by asking Partee if he was going to let the Union decide how many people they could have as shop stewards. Partee replied no, that they had to have an agreed limit in the plant. During negotiations (possibly at this meeting) Partee asked Mills what number of stewards he wanted. Mills answered that he did not know, that the situation changed from time to time, and the Union wanted the right to determine what it thought was needed, that the number of stewards was union business, not company business. When Partee asked if the Union had ever experienced a shortage of stewards in the plant, Mills replied he did not know. It is apparent the Company was willing to bargain about the number of stewards but that the Union was not, demanding, instead, unfettered discretion under the contract to control the number of stewards. They did not agree, so the topic was put aside as unresolved. Since the Company was not insisting on the right to determine the number of stewards, but merely wanted a maximum determined by contract, it cannot be said its position evidenced bad faith.

Mills had also proposed that the Union's designation of grievance committee members be unlimited. By contrast, the comparable provision in the old contract allowed the Union to designate a committee of three. The discussion consisted of Mills referring to that provision and asking, "What about the committee?" and Partee responding, "No, we can't agree." Mills testified, "We held that." Neither party gave any explanation justifying their respective positions on the number of grievance committeemen. Joe Sanderson Jr. testified, without contradiction, that during the term of the existing contract the parties, in fact, did not use the grievance committee, that the apparatus fell into disuse. There is no evidence that anyone objected to this at the time. In the circumstances I infer that the proposed removal of limits was unrelated to a specific labor relations consideration and was instead related to union prestige. As with the designation of stewards, the Company's conduct on this point did not evidence bad faith.

The next part of the proposal on union representation, to which Mills turned, was to give the union representation access to the plant at reasonable times during working hours with reasonable notice to the Company. The existing provision only allowed union officials access for the purpose of investigating grievances alleging violations of the contract and further required that a management representative accompany the union representative. With respect to the differences between his proposal and the old contract, Mills asked Partee if he was going to have to file a grievance to get in the plant. In answering, and in defense of the old provision, Partee noted that Mills had experienced no difficulty in entering the plant when he wished to. Furthermore, he expressed the wish that a management representative accompany him for health and safety reasons, saying, "We just can't take that out." Mills then agreed to the language of the old provision thereby settling that issue.

Mills then asked approval of his new proposal that stewards and committeemen investigating and handling grievances or contract negotiations be allowed the necessary time off with pay. Sanderson interjected that the Company was not interested in granting time off with pay without getting some work out of it. Mills replied, "Well, let's hold that." Whether this was a deferral of consideration because of obvious economic aspects is not clear. At that point the conduct on that issue did not demonstrate bad faith.

Checkoff. Mills next turned to checkoff. He apparently only briefly addressed the subject by saying that the Union had to have its standard checkoff form (although such requirement and the terms of such form were not spelled out in the proposal). According to Mills' testimony, Partee replied that the Company could not agree to

"it"—that they were thinking in terms of the old contract. It is unclear whether Partee was responding to the written proposal, Mills' verbal comment, or both. In any case, there was no further discussion, Mills simply saying, "Let's hold that." The discussion did not demonstrate bad faith.

Management-Rights. Partee then brought up the subject of management-rights, complaining that Mills had completely eliminated from his proposal the existing management-functions provisions. He said the Company could not agree to a contract without a management-rights clause. Mills explained that the old provision presented the Union with too many problems; that it could not live with it; that it could not represent the employees; that its hands were tied; that it just had to have some changes in it. Mills testified that he went into detail about problems in certain areas. He complained of union inability to file grievances involving management functions, and of the limitations on arbitrators deciding questions raised under the management-functions clause.

Partee explained his view that, because of Supreme Court decisions on arbitrability and Board rulings on the extent of bargaining without specific waivers, it was essential to employers that agreements contain detailed management-rights clauses. He argued that the existing management-rights clause was modified by all other parts of the agreement. But Mills did not construe management-rights as being modified by other provisions in the contract. He felt the existing provision needed revision and was proposing deletion of management-rights language. I find that Mills was in error respecting the law of contract construction. Both parties explained their position but held fast and refused to change. In these circumstances their conduct did not evidence bad faith. *American National Insurance Co.*, 343 U.S. 395 (1952).

Grievance Procedures. Mills' proposed grievance procedure was somewhat similar to that of the expiring contract, although broader in application, and, in several regards, more favorable to employees and less favorable to the Company. Mills asked Partee if they could agree on the grievance procedure proposal. Partee replied they could not. So, according to Mills, they held that proposal over. Although there was no extensive discussion, Partee noted that the fourth step had been eliminated from the proposal. Mills explained that experience had shown the fourth step to be useless and it would be preferable to proceed to arbitration after three steps. But there was no further discussion and they went on to the arbitration proposal. Given the nature of the proposal, it is unclear why Partee did not justify his position or make some move toward compromise. This was a failure to make a reasonable effort to agree. *Fitzgerald Mills*, 133 NLRB 877 (1961).

Arbitration. Mills apparently also noted the various differences between the proposal on arbitration and the existing provision, saying that the Union could not represent the employees under the old contract, that they had had too many problems with it. He testified that the Company (presumably Partee) reiterated, "We are thinking in terms of the old contract, and we've got to do what we're going to do within the framework of the old contract." Mills testified, "So, we held that."

Grievance and arbitration are the first point at which the Company demonstrated considerable inflexibility. Mills injected explanations and justifications for changes which were within the framework of the old provisions. The Company could have signaled some readjustment on such matters as elimination of the American Arbitration Association, which would have saved the Union money, or adjustment in the 10-day notice requirement since Mills explained the Union had experienced trouble making the deadline. In this regard it should be noted that Mills serves a large territory, a fact known to the Company, so it understandably could be difficult for him to become involved in an arbitration on short notice, as he might wish to be, or as employees or Local Union officials might wish him to be. These were minor points that a reasonably cooperative attitude might have worked out. Partee's attitude apparently was to give nothing. The Company's conduct in this regard did not satisfy the teaching of *Fitzgerald Mills*, supra; *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); and *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953). I find this to be evidence of bad faith in that it indicates a purpose to not reach agreement.

By contrast, eliminating the restrictions on an arbitrator to decide various questions was obviously a more difficult issue because the Company's existing advantage was substantial, and concession in this regard, likewise, would have been substantial. Rapprochement between the parties, without considerably more discussion, was most unlikely.

Bulletin Board. The existing provision read in part as follows, "Notices will be posted only after advance approval by the division manager and only in the designated space." Mills' proposal deleted this sentence but, in other respects, was identical to the old provision. He asked Partee if he was going to let William Magee (Local Union president) post meeting notices and the like on the bulletin board without having to first check with the plant manager. According to Mills, Partee replied, "Well, we like to know what's going up there, and we want to see what's going up before it's put up." Mills apparently took this as a rejection of his proposal. He did not press the matter further but simply said, "Well, let's hold that." I have some doubt that Partee was flatly rejecting the proposal. While he was not agreeing and was expressing preference for the old provision, the situation was such that a little argument might have borne fruit. But neither party pressed the matter and it was simply held as unresolved. The circumstances do not amount to evidence of bad faith.

Priority Issues. At some point in the session, Partee characterized the union proposals as a very large amount of material, that the issues needed to be narrowed, and the Company needed to know what issues had priority. Mills then indicated that the International's priority issues were those dealing with recognition, no-strike, and checkoff, and that the Local's priorities involved plant rules, seniority, and wages. He did not indicate any relative priority among these several topics or between issues of the International and the Local. Thus, the area

of possible bargaining remained quite broad. Wages, of course, had already been deferred as an economic issue.

At the end of the February 20 meeting, the parties had agreed on continuing the language of section 1 of the existing union-recognition provision but disagreed about deleting section 2. They also agreed on language regarding discrimination and regarding access to the plant for union agents. They did not agree on anything else.

In considering a date for the next meeting, it was apparent that both Mills and Partee had crowded calendars and were not easily available. Partee indicated he was available March 13 and 19. Mills pointed out that the current contract would expire February 26, and there was a need to work things out but he did not suggest a date to meet. Partee volunteered that the Company would let employees work on if they wished to work and that the Company did not anticipate any changes in the contract. Mills responded that, if the Company did not anticipate any changes, he did not see anything wrong with them agreeing to extend the old contract until they could get back together and work out a new one. Partee then shifted slightly, saying he did not anticipate any changes that he knew of. Mills left the room to confer privately with other union officials and shortly returned, informing Partee the employees would work on until they could resume negotiations, provided the Company did not change anything in the contract. Partee then hardened his position further, saying that, although the Company did not intend to change anything in the contract, the old contract would expire and the Company was unwilling to extend it beyond its expiration date. He said the Company would allow the employees to work if they wished to work and, if they wished to strike, the Company wanted 24 hours' advance notice. Mills agreed provided the Company was willing to extend the contract. Before Partee replied, Sanderson took him outside for a discussion. When they returned, Partee reiterated that the Company did not intend to change anything that he knew of, that the employees could continue working, but that the contract would expire February 26. Mills asked again if they were going to change anything. Partee then said for the first time that the Company was not going to honor the checkoff or the arbitration provisions after the contract expired. He again reiterated that if the employees should strike, the Company wanted a 24-hour notice. Mills replied he did not know what the employees were going to do. He reiterated the Union was willing to extend the contract pending negotiations but, if the Company was unwilling, he could not tell what the people would do. He said there would be a membership meeting that evening and it was going to be left up to the membership. Partee stated that if the employees should strike, the Company wanted 24 hours' notice. Apparently Mills made no response.

Nothing further occurred at that meeting except that, according to Mills, Partee at the end said, "We're thinking of the old contract, we're proposing the old contract, anything we do has to be within the framework of the old contract." This language, alone, might allow for an inference, as Respondent argues in its brief, that the Company was agreeable to using the old contract as a basis for negotiating revisions which would meet current needs and desires. But the inflexible attitude taken on some minor points on February 20 suggests that the Company intended holding to every detail of the old contract, was unwilling to give an inch, and was, in reality, proposing an unchanged old contract. In addition, company brinksmanship at the end of the meeting, by shifting and hardening its position regarding continuing the status quo pending negotiations, virtually invited a strike. Respondent's brief argues it was only engaged in hard bargaining. But to me its conduct is evidence of unwillingness to strive for agreement. *NLRB v. Truitt Mfg. Co.*, supra.

Respondent's position on expiration of the contract was 180 degrees from its position during the term of the contract. In April 1978 Sanderson had proposed to Mills, and Mills, on behalf of the International, tentatively agreed to an extension of the contract from February 26, 1979, to September 30, 1980, in consideration of extensive increases in the wage provisions. At Mills' suggestion, Sanderson met in May 1978 with a local delegation consisting of Local President Magee and two member representatives. He put the same proposition to them and, according to Sanderson, they expressed their approval. None of the union representatives at either the local or International level suggested any other changes in the contract. This underscores the reasonableness of Respondent's initial approach to the negotiations at issue in this case, that the existing contract was a viable basis for negotiating a third agreement, as well as Mills' proposal to extend the contract pending negotiations.

In spite of the affirmative responses he received from officials of both the International and the Local, Sanderson's 1978 efforts to obtain an extension of the second agreement failed. In the latter part of June 1978 Magee informed him that at the June meeting of Local members, attended by only seven persons, the proposal to extend the contract was defeated by a vote of four to three.

The contrast between the Company's position in negotiations on extension of the contract and its 1978 proposal to extend underscores the inflexibility of its negotiating attitude and lends support to the inference that it was inviting the strike which followed on February 27.

3. The third session—February 24

At the conclusion of the February 20 meeting the understanding between the parties was that they would resume negotiations on March 13 and 19, the only dates that had been mentioned. After leaving the meeting, and in view of the fact that the existing agreement was to expire on February 26, Mills contacted Charles Tolbart of the Federal Mediation and Conciliation Service who arranged a meeting of the parties with himself at Laurel on Saturday, February 24.

The mediator opened this meeting by stating his understanding that the existing agreement would expire on Monday, February 26, and that the Company was not willing to extend the agreement. He asked for the comments and positions of the parties. Partee deferred to Mills who stated that, in view of the expiration of the

contract and the absence of an extension, the Union did not know what was going to happen. He indicated willingness to work out a new contract immediately.

Partee then commented that there was no way the Company could address all the issues the Union had placed on the table, there being, he said, 106 changes from the existing agreement. He reiterated the Company's willingness to negotiate within the framework of the old agreement and, if the Union had minor changes to propose and let the Company know what they were, to consider them. Mills then began discussing specific issues but Tolbart stopped him, separating the parties into different rooms.

The mediator first met for about an hour with the Company. He then met separately with the union committee, telling them he had unsuccessfully tried to get the Company to extend the contract. He informed Mills that the parties would have to make the determination of what to do themselves. Before the overall meeting ended, the mediator in the presence of both parties asked Partee whether the Company would extend the contract and Partee responded that Mills had their answer on that already, thus, by implication, reiterating his position taken on February 20 that the Company would not extend the contract to avoid a strike. The mediator recessed the meeting subject to call by himself based on whatever further information he might receive from the parties. Mills informed the meeting that the problem would be presented to the union membership that evening[3] and that he did not know what they would do.

4. The strike

The evening of February 20 Mills had met with the Local's membership. He had reviewed for them the negotiations, including union proposals and company responses. He told them he felt the Company was not bargaining in good faith, that the Union had not received any counterproposals,[4] and that he thought the Company was set to take a strike. The membership authorized a strike, leaving it up to the negotiating committee to actually call the strike, should they see fit, and if there were no movement in the negotiations.

Subsequent to the unproductive session with the mediator on February 24, and after Mills had left Laurel, the local committee decided to strike on Tuesday, February 27, the day after the contract expired. On that day the day shift commenced work at 7:48 a.m. In midshift, about 10:45 a.m., without notice to the Company, the employees went out on strike. At the time of the hearing the strike continued.

There is no question but that the strike was called to support the Union's bargaining demands. At issue in this proceeding is whether company unfair labor practices also caused or prolonged the strike. Prior to the strike, the only evidence of company bad faith in bargaining on substantive topics occurred February 20 in the discussions about grievance procedure and arbitration proposals. But that conduct only involved minor points. However, at the conclusion of the February 20 meeting, in connection with efforts to arrange the next meeting, Mills noted that the current contract would end February 26 and he was willing to continue meeting in an effort to reach agreement before then. He thereby applied economic pressure on the Company by suggesting the absence of a contract and, by implication, the possibility of a strike. In response, the Company, by degrees, hardened its position to the point where, in the end, it flatly stated the contract would expire on February 26, rejected any extension, and indicated certain important provisions would cease to apply. Resort to economic pressure by either or both parties in support of bargaining demands is not, in itself, conduct indicative of bad faith. But, here, the Company, in the process of hardening its position, also kept shifting its position, apparently to avoid terms to which the Union might agree. This shifting of position was, I find, conduct evidencing a desire to avoid agreement. While it is true that progressively shifting to harder positions is consistent with hard bargaining, it is also consistent with an ultimate purpose of not reaching agreement and getting rid of the Union. If, in fact, that was its bargaining intent, then several months later it took advantage thereof when it withdrew recognition from the Union and unilaterally granted a wage increase to employees who were working in spite of the continuing strike. Considering the overall evidence, I find the shifting position on February 20 was also conduct evidencing bad faith. This, together with the bargaining conduct respecting grievance procedures and arbitration, warrants the finding, which I make, that the Company was not bargaining with a sincere purpose of reaching an agreement.

That evening, partially in response to that conduct, the union membership authorized the strike. And a day or so later the union negotiating committee called the strike for February 27. Based on this sequence I find that the strike was in part caused, and thereafter prolonged, by Respondent's above-described conduct in which, as found hereinafter, it was not bargaining in good faith as required by Section 8(a)(5) and (d) of the Act. Accordingly, the strike was an unfair labor practice strike. *General Athletic Products Co.*, 227 NLRB 1565, 1576 (1977).

5. The fourth session—March 21

February 27, the day the employees struck at Laurel, Mills had occasion to speak with mediator Tolbart in Jackson, Mississippi. He asked him to arrange another meeting with the Company. Tolbart set up a meeting in Laurel for March 21.

At the start, Tolbart stated he had called the meeting because he understood there had been a work stoppage and wanted to see if he could get the position of each party. Partee again deferred to Mills, who declared the Union was present, wanted a contract, and was willing to stay and negotiate until they obtained one. According to his testimony, he said, "We don't want a work stoppage, but whatever is agreed to here has got to be something that will address the issues out there where we can

[3] The record indicates he already had met with the local members on February 20.

[4] Mills apparently did not consider Partee's proposal of sec. 2 of the old contract provision on union recognition to be a counterproposal, which in fact it was.

properly represent these people." He also said the Union was not tied to the particular language he had proposed but was tied to something whereby it could properly represent the employees.

Partee responded as in the past that it was impossible to make counterproposals on the basis of the Union's demands, there being no way that they could address all of the numerous issues. He proposed instead the previous contract. He said the Company was willing to discuss minor changes within that frame.

Mills replied there was no way the Union could agree to the old agreement because there had been too many problems under it and they had to straighten out some of these problems which he began to detail. At that point the mediator interrupted him and once again separated the parties. The record does not reveal what, if anything, further transpired at the March 21 session, but it is apparent that no agreement was reached.

6. The fifth session—March 28

The next session, March 28, was also called by mediator Tolbart. Although Mills technically was still the Union's chief negotiator, he was, for the first time, joined by International Representative Jerry Levine, an attorney and member of the legal staff of the International. That session was the last in which Mills participated. As described by Levine, he and Mills shared the responsibility of union spokesman at the March 28 meeting. From that point on, Levine took over as union spokesman.

Tolbart opened the meeting by asking for the position of the parties. According to Levine, Partee stated, "The Union's position was to give the Company a take-it-or-leave-it offer. The Company position is that the contract is okay, we're willing to listen to any specific problem, but will not change the entire contract." As in the first session, Mills again began by reviewing the entire union proposal section by section with Partee responding as they went along. Overall their positions remained unchanged, the Mills' review apparently only serving to orient Levine as to the bargaining situation.

Union Recognition. Near the outset, and at least at one other time during the session, Levine injected a new note of uncertainty and disagreement by declaring the Local was not the agent of the International as described in the introductory sentence of the Union's proposal as well as in the two prior agreements. This prompted Partee to note that only the International had been certified by the Board and, if the local were not the agent of the International, it lacked the necessary status to bargain for the employees. He speculated that perhaps the Company should not be bargaining with the Local. However, neither party proposed new language to replace the description of the Local as the agent of the International, and the question raised by Levine was left open and, according to him, remained a matter of disagreement. Levine must bear full responsibility for this disagreement.

As already noted, the prior agreement contained an additional section under recognition which the Union now construed as a limitation on its representative functions and, therefore, omitted from its proposal. Partee proposed that the new agreement include this old language, stating that, in the circumstances, limiting language was justified to prevent unnegotiated alteration of contract rights through arbitration decisions during the term of the contract. As an example of such possible alteration, he pointed to the Company's right to contract out work under the prior agreement. The Union argued that the limiting language was unnecessary. Levine stated that the Board certification was not for employees as stated in the old section 2, but rather for the work that particular employees perform. Partee accused the Union of being inflexible, an accusation which Mills denied, stating that the Union was not tied to any particular language, but rather was tied to achieving a provision by which it could represent the employees. He expressed willingness to consider alternative language to that proposed, if it would satisfy this demand of the Union. The positions of the parties remained unchanged from previous sessions, the Company agreeing to the language proposed by the Union, but the Union not agreeing to the Company's counterproposal that the language of section 2 of the recognition clause of the old agreement be added. In a word, they disagreed. The conduct of neither party on this topic evidenced bad faith.

On the topic of *Union Representation* the position also remained unchanged, although they engaged in considerable discussion. The Union reiterated its proposal that there be no contractual limit on the number of shop stewards and grievance committeemen to be named. As to unlimited stewards, Partee asserted that, in the past, the Union had, in fact, not designated all the stewards authorized under the contract even though the Company was required to deal with stewards. As to grievance committeemen, Levine justified the proposal by declaring the Union was not wedded to any particular number but desired flexibility to permit makeup of a committee suitable to the grievance being considered. He did not, however, suggest any language to reflect this particular need, the proposal only being to leave unspecified the number of committeemen to be named by the Union. No agreement was reached on either the stewards or the committeemen. The Union further proposed that employees involved in grievance handling be paid by the Company for the time spent. Again the Company was unwilling to pay this cost, saying that it was union business and should be paid with union funds.

Although the proposal regarding stewards was somewhat removed from reality because of the history of not naming all the stewards contractually authorized, the proposal, in the light of the explanation made earlier, was not unreasonable. It is difficult to understand why neither party suggested simply increasing the authorized number. The fact that the Union did not suggests that its true purpose had nothing to do with realities in the plant but, instead, as Partee put it, was of a cosmetic nature so that it would not appear in the contract that the Union was limited in how many stewards it could have. On the other hand, the Company's refusal to consider paying stewards or committeemen for time spent on grievances, on the ground that such activity was union business, seems at odds with its desire to have some control via the contract on the maximum number of these functionaries. As to Levine's idea for a more flexible grievance

committee, the evidence indicates that, in the past, an appropriate grievance committee member often was unavailable when needed and Sanderson, apparently with the approval of the steward and chief steward involved, simply called someone else from the department involved to act as a stand-in. There is no evidence this did not work satisfactorily, but it is at least arguable that, in such circumstances, management was involved in selecting the union committeemen on an ad hoc basis. It is difficult to understand why the Company did not affirmatively attempt to work out some accommodation in this regard. Given the background here, the fact that the Company did not suggests a bargaining strategy of pointing out the unacceptability of union proposals but not coming forward with affirmative proposals to deal with even obvious bargaining problems. This strategy necessitated that all movement originate from the union side. This conduct, standing alone, was not unlawful but, when considered with other conduct evidencing a purpose to avoid agreement, tends to support a finding that that was Respondent's purpose.

Pension Plan. According to Mills, Levine inquired whether the Company had a pension plan. Partee replied it did and that it was in effect. Levine asked for copies of the plan. Partee did not have them with him but promised to provide them. Levine also asked about the cost of the pension plan, figures which Partee was unprepared to provide but also promised to send him. Similarly, Levine inquired whether the Company had provisions for the actuarial reduction of the pension for an early retiree. Partee said he had no knowledge in this respect, but promised to send Levine information on the subject. Levine testified that he subsequently received all this information. The interchange on these matters and the subsequent supplying of the information indicate good faith of the parties in this regard.

Checkoff. According to Mills the parties' position respecting checkoff remained unchanged. Levine described the discussion as very brief. According to him the Union wanted "standard" language for the period during which employees could revoke authorization. He described the language in the old contract as not being "standard." In his testimony he did not elucidate on what he meant by "standard" but, from other evidence in the record, I infer he was referring to the wording of the form then preferred by the International. In describing the session Levine testified, "The Company's position was sort of negative," but he did not specify further. The paucity of discussion at this meeting could hardly be described as significant bargaining.

Management-Rights. The next topic addressed was management-rights. In support of the union proposal to eliminate old provisions, Mills cited instances of employees having been discharged for excessive absences. Partee responded that the Company had to have a management-rights clause and, in answer to questions from Levine, reaffirmed this position respecting each of the three sections of the management-rights provisions in the old contract. He accused the Union of attempting to frustrate agreement by insisting on eliminating management-rights from the contract. Levine did not retreat, he observed that even in the absence of a management-rights clause an employer has the right to manage a business, and that the Union here was not seeking to deprive the Company of that right. It is clear, however, that the Union was firm in its proposal to eliminate whatever advantage the Company previously enjoyed by virtue of its contractual management rights. The positions of the parties remained unchanged on this topic. I find no evidence of bad faith in the discussions.

Plant Rules. Mills next turned to his proposal that plant rules be negotiated with the Union. Levine inquired whether plant rules existed and asked for copies of any. Partee admitted there were plant rules and promised to supply copies. Mills argued that the Union's right to negotiate on plant rules was essential for adequate representation. Partee argued in reply that these needs were already being fulfilled because the Union could contest the reasonableness of rules through grievance and arbitration. To this Mills responded that it was foolish for the Union to take a matter to arbitration if the power of the arbitrator to decide the matter was already limited by contract. While there appeared to be back-and-forth discussion, there was no resolution. The plant rules proposal was new, there being no comparable provisions in the old contract. The interchange of views on this topic did not involve conduct evidencing bad faith.

Grievance Procedures. With respect to grievance procedures, Mills reiterated the same points he had made in earlier sessions respecting his proposals. Specifically he mentioned that the old definition of a grievance was too narrow and needed broadening, that the time for filing a grievance should be enlarged, and that the Company should forfeit on any grievance to which it did not provide a timely answer. He also made an argument against the old provision which limited awarding of backpay in a grievance to the time subsequent to the filing of the written grievance. To this Partee responded that the Company would reexamine the question and get back to the Union at a later point, thus demonstrating a new willingness to consider variations from the old contract and, possibly, adjust unjust situations. Partee complained that the Union was inflexible. Levine asked where he got that idea and Partee replied that he understood the Union's position to be fixed. Levine denied this, saying that the union position was subject to negotiation. This indicates some union willingness to adjust its proposals. No agreement, however, resulted on grievance procedures. I find no evidence of bad faith in their interchange.

Arbitration. They then turned to arbitration, discussing first the use only of Federal Mediation Service arbitrators which the Union characterized as less costly. Partee indicated tentative agreement provided his examination of a current list of Federal Mediation Service arbitrators did not include unacceptable names. Thus, on this point also there was progress. They also discussed the union proposal that arbitrators be given greater decisional latitude. So far as the record reflects, no resolution was reached on this point. The discussion on arbitration revealed no evidence of bad faith.

Bulletin Board. According to Mills, he again raised the proposal respecting a union bulletin board and again the

Company disagreed. Whether or not any discussion occurred does not appear in the record.

Second Shift. At this point Levine injected a new topic. Since the strike began, the Company had notified the Union by letter of its intention to abandon the second shift. The Union's general counsel had asked, also by letter, for certain information on that subject. At the time of the March 28 session he had not yet received that information, so Levine asked Partee if he could have it. Partee replied he had not had time to get the information together but that he would, and would transmit it by letter to the Union's counsel. He subsequently did so. Although not a topic of contract negotiation, the matter of information respecting abandonment of the second shift is indicative of a company attitude of good faith in recognizing the Union's right to know as employee representative.

No-Strike/No-Lockout. Mills next addressed the union proposals regarding no-strike/no-lockout under which the Union avoided a categorical undertaking that there would be no strikes, as it had in the old agreement, but instead undertook not to call or engage in strikes to change the contract or strikes to support a grievance subject to arbitration. Mills argued that under the previous contract, employees could not strike in protest of unfair labor practices. He also argued, in support of his proposal, that the Union wished to limit its liability for wildcat strikes and that its commitment to take reasonable steps to get striking employees back to work was a sufficient no-strike undertaking. Partee replied that, under the old provision, the Union could have its day in court if any damage claim were made against it based on an unauthorized strike, and he declared that no court would hold the Union liable for damages if it had taken reasonable steps to get the employees back to work. He said that all the Company got out of a contract was the Union's pledge that there would be no strike and the Company intended to retain that provision.

In the course of the meeting, Levine made a new verbal proposal, namely, that the parties delete all language respecting the banning of strikes or lockouts and all provisions respecting arbitration of disputes. Partee rejected this out of hand, characterizing it as an invitation to industrial warfare.

Levine's proposal to eliminate the already accepted concepts of no-strike/no-lockout and arbitration was certainly not conducive to reaching an agreement or an indication of a desire by the Union to reach agreement. Of course, he may not have been serious. The proposal may have been a stratagem to put the topics of strikes and lockouts on the one hand and grievance and arbitration on the other on an equal footing. This is speculation, however, there being no evidence he was not serious. By contrast, Partee's shrinking from the risk of industrial warfare, coupled with a counterproposal on no-strike/no-lockout which had existed for the previous 6 years in conjunction with established grievance and arbitration procedures, was more indicative of a desire to bargain to agreement.

Timeclock. According to Mills, he also discussed his proposal that employees be paid in accordance with timeclock entries rather than by a foreman's notebook entries. There appears to have been some discussion between Partee and him about the system in use in the plant, but it does not appear whether there was acceptance or rejection by the Company of the proposal. It is a matter on which the General Counsel had the burden of proof, a burden which does not appear to have been carried.

At the end of the fifth meeting the Union's position remained essentially what it had been all along. It made no other proposal except its initial ones which were amended, in minor respects, on the topics of union representation, participation of an International representative in grievance procedures, the list for arbitrators, and the ad hoc proposals made by Levine. No additional agreements were reached.

The Company's position, which had been stated earlier several times, remained essentially the same. Its counterproposal was the terms of the old agreement. Respecting the Union's proposals, Partee again stated he was unable to respond because of the large number of proposals and because he was in the dark as to the Union's view of their relative importance. On the other hand, Mills testified that he stated the Union's priorities as he went through the entire proposal. The record, however, does not reflect that he pointed out their relative importance in the course of the negotiations. At the hearing, he testified that the Union's main priorities were the recognition clause, management-rights, the seniority provisions, the grievance and arbitration procedures, the authorization of arbitrators to decide matters covered by the no-strike clause, and abolition of the so-called zipper clause. I find that, while there was some basis on which Partee might have speculated as to the Union's priorities, the Union did not give any clearcut signal to management as to whether any topics were more important than any others., Mills simply put them all on the table.

7. The sixth session—April 10

On April 10 the parties and mediator Tolbart met for the sixth bargaining session.

Pension and Insurance. As the meeting opened Partee supplied Levine with copies of a booklet describing the company pension plan and a copy of a letter Partee had sent to the International's general counsel containing information he had requested earlier. In addition, a company official named Walters presented data on insurance costs. He described certain contemplated changes in maternity benefits effective May 1, made to comply with changes in the law. Partee asked for union agreement. Levine replied he would let him know later. At the next two meetings they discussed the insurance question further and, on April 19, Levine agreed to the changes scheduled for May 1. The whole sequence dealing with insurance demonstrated effective good-faith bargaining by both sides.

Plant Rules. The Company also supplied the Union on April 10 with copies of its written plant rules (also called work rules) which Levine had requested. Sanderson verbally described when particular rules had gone into effect.

The parties then discussed certain of these rules, the first being the rule on absences. Employee members of the union committee asserted they had never seen parts of this rule. They further complained that, in practice, supervisors did not adhere to the rule as written.

During the discussion of plant rules, it became apparent that, in practice, all rules were not promulgated in written form. A number, which management asserted were, in any case, universally known to employees, were verbal rules. These included rules limiting employee use of restrooms while on duty, the wearing of hairnets and rings while on duty, and employee use of company parking facilities. The one most objectionable to employees was the rule on restrooms. The normal plant schedule for a daytime shift included a regular morning break, a midday lunch break, and an afternoon break in the event that the production line remained in operation long enough to require one. If it did not, the employees were released to go home. Management expected employees to use these various breaks to use the restrooms. Some employees were of the view that this deprived them of free time which they had earned. In addition to the regular breaks, the verbal rule on restrooms allowed employees to leave the production line in order to use the restroom, when necessary, and provided a substitute was available to relieve the employee. The rule limited such extra restroom breaks to three per week for each employee. Those taking a greater number were subject to counseling, a warning, or discipline.

The Union, and particularly employee members of the local committee, objected to the limit of three extra restroom breaks per week. They further objected to the administration of the existing rule on the ground that, on occasion, relief of an employee in distress was not provided or was unreasonably delayed. They cited incidents which they claimed were abuses of the rule. Partee took notes, saying he would respond.

At some point during the April 10 meeting, local committee members also complained of the inequity of the rules on tardiness and absenteeism, as applied by some supervisors, asserting that being late as little as 6 minutes had been treated as an absence with possible discipline at a later time, while an absence of more than 1 day for the same reason had also been treated as only one absence.

They also discussed the system of regular breaks, but the record does not reveal the content of the discussion.

Finally, within the general topic of plant rules, the local committee members complained of the existing system whereby employees were paid according to notations made by a supervisor in a notebook rather than according to the timeclock. Apparently, the only function of the timeclock was to document tardiness and absences. Partee took notes on all these complaints.

At the April 10 session these "bread and butter" complaints of the plant employees began to emerge, and at subsequent sessions became increasingly apparent. With his takeover of the helm of union negotiations, Levine increasingly involved local committee members in negotiations. What resulted was a de facto change in emphasis from the "shotgun" approach of Mills based on the numerous changes sought in his far-ranging proposal, to a greater concentration on the specific complaints of local employees. This change in focus put these local complaints in the forefront of issues being pressed by Levine and thereby indicated by action, whether verbalized or not, some degree of union priority respecting the issues put forward. I do not find that on April 10 such was apparent, or ought to have been apparent, to company negotiators. But, as time went on, and Levine continued and increased the emphasis on local issues, the thrust of union contentions, and therefore the relative priority of local problems, became more apparent and company negotiators, at some point, either knew, or ought to have known, that those matters had become top priority for the Union.

Management-Rights. At this session Levine and Partee had considerable discussion of management-rights. In connection with their talk on plant rules, Levine complained that, under the old contract, the management-rights clause gave management sole authority to promulgate plant rules without consulting the Union, and such rules were not subject to the grievance procedures except on the grounds of unreasonableness. Even unreasonableness could not be taken to arbitration, the arbitrator being limited to whether the rule was violated or not. He also asserted that, under the old contract, management was exempted from negotiating with the Union prior to exercising any of its management-rights. He contended that the law required such negotiations with the Union. At the hearing, however, Levine admitted that broad grants of management-rights in the old contract were modified by subsequent specific provisions in the agreement.

Mills, in his proposal, had entirely deleted management-rights provisions. On April 10 Levine verbally modified the proposal to include a management-rights clause worded as follows:

> That except as specifically abridged by a provision in this agreement, the Company retains the right to exercise all the rights and functions of management.

This was a revision of section 1 of the management-functions article of the old contract, deleting all reference to grievance procedures.

Partee rejected the revised proposal, saying the Company needed much more. Levine asked for a counterproposal, but Partee offered none. Levine then asked him if he still insisted on the language of the entire section 1 of the old provisions on management-rights (which excluded their exercise from full grievance and arbitration). Partee replied he did, that the Company would not enter into a contract requiring daily bargaining. Levine said he was not asking for daily bargaining; he only wanted the objectionable language deleted. Levine asked if Partee was willing to change any portion of the old management-rights provisions. Partee replied no.

Throughout the whole exchange on management rights, all the affirmative efforts to adjust came from Levine. Admittedly some of his arguments were erroneous, but he had to pull each specific position out of Partee by asking additional questions. The net effect was to force the Union to do all the accommodating. It would be easy to exaggerate the extent of that accommo-

dation. But, by contrast, the Company made no affirmative effort. Its part in the interchange bespeaks foot-dragging in an effort to adhere to an intransigent position on management rights. This is not to say that that bargaining posture was, by itself, unlawful, but, when considered with other evidence of bargaining attitude, such conduct is some evidence of an intent by means of surface bargaining to avoid agreement. *NLRB v. Truitt Mfg. Co.*, supra; *General Electric Co.*, 150 NLRB 192 (1964); *Irvington Motors*, 147 NLRB 565 (1964), enfd. 343 F.2d 759 (3d Cir. 1965); *Fitzgerald Mills*, supra.

No-Strike/No-Lockout. During this sixth meeting, the parties also extensively discussed the topic of no strikes or lockouts as proposed in Mills' package. Under this proposal, the Union would promise, for the term of the agreement, not to engage in strikes to change contract provisions or to support grievances subject to arbitration. This contrasted with its undertaking, under the old contract, not to engage in strikes for any purpose.

Partee objected to this more limited strike ban being proposed, saying that the Company needed a total no-strike commitment. He argued that, under the old management-rights clause, the Union with this more limited no-strike commitment could strike regarding the exercise of all management rights because they were not subject to arbitration. He said Levine had opened the door wide for strikes. To this, Levine cogently replied that the union proposal on management rights would subject their exercise to grievance and arbitration procedures and, therefore, under the Union's no-strike proposal it would not be able to strike. It is apparent that the Union's bargaining purpose was to arrive at arbitration provisions coextensive with the undertaking not to strike.

Partee then voiced additional objections to the union proposal on the ground that the Union's undertaking to ensure that unauthorized strikers would return to work was inadequate. He pointed to case law indicating the practical need for an employer to have union duties, in this regard, spelled out specifically in an agreement.

Levine responded that the Union was itself not seeking to strike during the contract term and would endeavor to get unauthorized strikers back to work. But Partee contended the proposal did not accomplish that. He expressed apprehension that the loose language proposed was a way to get around court decisions requiring good-faith union steps to return strikers to the job. He said, under the proposal, the Union could go through the motions while a strike continued and avoid liability for it. All he wanted was for the Union to do what the case law required—to take those reasonable steps needed to end a work stoppage. Levine then suggested that Partee put something in writing for his consideration. Partee agreed to do so. On this aspect of the topic, the bargaining resulted in some progress.

They engaged in some further inconclusive discussion over the wording of section 3 of the old no-strike provision, Levine contending that it even prohibited strikes to protest unfair labor practices. Levine argued such a provision was inappropriate, the Union having an absolute right to strike against unfair labor practices in all circumstances.

Probationary Period. Regarding the Union's proposal for a 30-day probationary period for new hires, instead of the old 90-day period, Levine asked Partee why the Company objected to the shorter period. Partee described in detail the plant's operation as a justification for the longer period. He noted, in particular, the perishable nature of the product, the processing of which was under the surveillance of Government inspectors; the high volume production line which, once started, could not be stopped until all produce on the line was processed; and the need for employees to properly perform a variety of job assignments.

This was the last topic discussed on April 10. Following the above justification, the union representatives caucused separately and drafted a revised proposal to continue the 90-day probationary period but move up the normal 10-cent-per-hour raise at the end of the period to 60 days after hire. Mediator Tolbart delivered this revision to the company delegation. He reported back shortly to the Union that the Company said no, that there was no counterproposal.

There were, of course, certain economic aspects to the revised proposal. But there was no explanation offered as to why it was rejected. The circumstances were such that some explanation rather than a flat, unexplained rejection was in order. I find these circumstances to be an additional indicia of company surface bargaining. *Fitzgerald Mills*, supra.

8. The seventh session—April 18

Insurance. The negotiators met for the seventh time on April 18. Partee opened the session by alluding to insurance costs and maternity benefits under the company insurance program discussed earlier. He corrected some earlier information, saying the plan was now slated to become operative May 1. He asked for union approval. Levine promised a reply the next day.

Second Shift. Most of the meeting was devoted to discussing the feasibility of continuing a second shift, but the specifics of the interchange are not in the record.

Restrooms. Levine brought up the subject of restrooms, but here, too, what was said is not apparent in the record.

Attendance. The last topic discussed, attendance problems, was also raised by Levine. Since the previous meeting, management officials had examined personnel records about the incidents of attendance-rule abuse by supervisors, about which local committee members had complained. Using this company data, management officials orally began to refute the incidents described by local union representatives on April 10. As the presentation progressed, the local representatives became upset, asserting the company statements were untruthful, that the records were wrong. A general commotion resulted.

Partee then stopped the oral presentation and simply delivered to Levine the notes developed from company records and which explained the company position. The notes conflict with the April 10 description of the incidents by local representatives. No resolution of the matter was reached on April 18. This was the last item

dealt with that day. The parties adjourned to the following day, April 19.

9. The eighth session—April 19

In the eighth session, Levine continued his efforts begun April 10 to focus more sharply on the human problems implicit in the requirements that production line employees be on duty and remain on duty on the line. He thus continued signaling with added emphasis that these were "up-front," first-priority topics for the Union.

Insurance. Partee had opened the April 19 session by asking for Levine's response to his insurance proposal made the day before. Levine again put him off, saying he would answer later because he had something else in mind to consider. Employee Jo Ann Yates was present with a small child and Levine proposed to have the meeting hear first from her. There was no apparent objection.

Restrooms. Written plant rules dealt with tardiness and absenteeism, but not with extra breaks for use of the restrooms, the rules for which were promulgated orally by line foremen. One of the incidents of alleged supervisory abuse regarding such relief, to which local committee members had referred on April 10, had involved Jo Ann Yates, it was alleged, was held on duty on the line, which caused her to have a miscarriage. Management negotiators had responded in writing on April 18 to the effect that Yates was never talked to about leaving the line for restroom relief. This appeared to be a virtual denial that anything unusual had occurred.

At Levine's request Yates appeared in person on April 19 to report what had occurred. She told the assemblage that in early January, while she was pregnant, she was working on the line and requested special relief between breaks to go to the restroom. She was told she could not be relieved. She made a second request but was not, she said, relieved until 45 minutes had elapsed since her first request.[5] Later, that night at home, she suffered a miscarriage.

On April 19 the local committee also cited an incident involving female employee Tommy Bynum who had also requested, and had been refused, permission to leave the line for an extra restroom relief. As a result she soiled her clothing.

In the bargaining which followed these presentations, Partee expressed sympathy but suggested that the situation be handled by supervision's voluntary efforts to improve administration of the rule. Levine rejected such an approach as inadequate, characterizing the entire procedure as dehumanizing, and declaring that contract language was required to meet the problem. Partee disagreed, saying that contract language was neither necessary nor desirable. Levine then asked for a guarantee that such incidents would not recur, but Partee refused. This was followed by lengthy separate caucuses of the parties during which Levine drafted a proposal for extra restroom relief which mediator Tolbart delivered to company negotiators. He proposed: (a) no employee be denied the right to use a restroom; (b) the Company would attempt to have sufficient "extra board" employees to allow line relief without "undue delay" and, should no relief be available, the line employee could use the restroom "without penalty"; (c) the personnel manager would counsel employees who make unnecessary restroom trips; (d) supervisors would not "interrogate" employees about use of the restroom; and (e) the foregoing contract provisions should not be construed as an invitation to employees to use the restroom at will and abuse could result in progressive discipline.

Upon receiving this union effort to meet both the production and humane aspects of the situation, Partee did not immediately respond. Instead he sent word through the mediator that he wished to continue negotiating as to the discontinuance of the second shift, a topic discussed at the previous session. This would have been a switch away from restroom relief, the topic then being considered and obviously a matter of top union priority. While discontinuance of the second shift may have been of first concern to management, it was not then the subject before the parties. Levine became annoyed and insisted on dealing with the restroom problem before changing to another topic and refused to talk with Partee about the second shift. Partee accused the Union of not being willing to meet.

When Tolbart finally got them into the same room about 2 p.m., Levine and Partee exchanged heated words. Without condoning the ill-tempered outbursts of either of these experienced negotiators, I find Levine's position the more reasonable. All along the Company had pressed for an indication of union priorities in order to reduce the issues. By shifting his emphasis in bargaining, Levine had plainly signaled that breaks in general, and in particular extra restroom relief, were top-union priorities. In the circumstances the Company could reasonably be expected to respond promptly in a manner aimed toward resolution of that problem. Instead Partee made a pro forma response by finding faults in the union proposal, but made no affirmative suggestions for adjustment. He ended up rejecting the whole proposal as unacceptable. Specifically, he told Levine the Company would not agree to maintain an adequate extra board for restroom relief on the gound that it could not guarantee it. He took this position, even though the Union had not sought a guarantee. He indicated the Company could not assure relief without "undue delay," as proposed, because that meant immediate relief and management could not promise immediate relief. He asserted that, under Levine's proposal, employees could leave the line at will and management would be powerless to prevent it, that employees could stop the production line, even when unwarranted. He faulted the proposed limitation on foremen questioning employees about restroom relief. He took this position, even though many of the foremen are male while many of the line employees are female. He claimed that limiting the counseling about restroom abuse to the personnel manager was an unwarranted limitation on supervision. He characterized Levine's general

[5] Joe Sanderson Jr. testified that his own subsequent investigation (possibly in preparation for trial) indicated the delay had been 25 minutes. There is no indication any real investigation was made at the time of the incident.

disclaimer that the provision was not an invitation to use restrooms at will as "meaningless."

Levine made numerous further adjustments and deletions in his proposal, specifically directed to meeting Partee's objections, but to no avail. Although most of the afternoon session was spent on restrooms, no progress was made. All efforts to solve problems were on the union side. Partee only raised objections and, in the end, rejected everything proposed.

Insurance and Second Shift. At some point in the early afternoon, having delivered the company position to Levine's restroom relief proposal, Partee declared he had now "responded" to the proposal. He asked that Levine respond to the Company's new insurance program to which Levine had deferred his response. Sometime during the session Levine agreed to that program. Also during the afternoon Partee again raised the issue of continuance of the second shift. Levine asked for, and Partee agreed to allow him access to, company records relating to the second shift. The interchange between them regarding insurance and second shift involved no bad-faith conduct.

But the same cannot be said for company bargaining on restroom relief. Irrespective of any later treatment of the issue, company bargaining on April 19 indicated an intransigent attitude and an unwillingness to make any effort to resolve the mutual problem. Company negotiators did not display the open mind, the desire to reach agreement, or the effort to reach common ground of which the Supreme Court spoke in *NLRB v. Truitt Mfg. Co.*, supra. Partee just went through the motions of bargaining. *Tower Hosiery Mills*, 81 NLRB 658 (1939), enfd. 180 F.2d 701 (4th Cir. 1950).

10. The ninth session—May 1 sessions

On May 1 the parties met for the ninth time and with the intention of continuing the next day, if necessary. As it turned out, the May 1 session, which began during the day, was resumed that evening, and the scheduled May 2 session was canceled because Partee could not attend.

The daytime talks dealt with restrooms and regular breaks. Agreement was reached on restrooms but not on breaks.

Restrooms. The discussion commenced with a reiteration of the previously stated company position that the restroom relief question did not require contract language and the matter should be left for unilateral handling by supervision in administering a so-called open door policy vis-a-vis employees and through continued availability of the plant nurse. Levine then suggested contract language, used in another union's agreement elsewhere. With this in hand, company negotiators caucused, returning with the following proposal on restroom relief:

> Emergency relief shall be provided for emergency to the plant medical facilities and restrooms.

The Union agreed to this proposal, thus seemingly putting to rest that issue. But, even in achieving this ultimate agreement, most of the effort toward agreement was union generated. I do not find that the May 1 resolution of the issue cured or wiped out the evidentiary significance of company conduct on April 19.

Breaks. The subject of breaks, although related to restroom relief and attendance, was dealt with separately, and involved arrangements for normal breaks during a day shift. Discussion, although extensive, resulted in no agreement.

The Union wanted a system of regular breaks, including a midmorning break, and an ensured afternoon break. Nonluncheon breaks had been 10 minutes. Levine drafted and submitted to Partee a written proposal enlarging these to 15 minutes and guaranteeing an afternoon break. Partee persuaded Levine that the time enlargement was an economic matter which should be deferred with the other economic questions. He took the balance of the proposal for consideration.

On the general concept of breaks, it appears that employees thought of them as earned free time on which they were somehow being short changed. Specifically, with respect to afternoon breaks, they were unhappy because such breaks were not always given. By contrast, management apparently thought of employees only earning pay for work performed and conceived the breaks as unearned releases designed to promote more efficient performance.

Joe Sanderson Jr., responding for the Company, referred to the underlying mechanical and health considerations which defined the entire operation. These involved close and continuous sanitary controls by in-plant U.S. Department of Agriculture inspectors and, on the mechanical side, the fast-moving, high-capacity, conveyor line necessitating a rolling schedule for breaks. Scheduling of afternoon breaks was further complicated by variability in the length of afternoon operations. The conveyor line, of necessity, continued operating until incoming unprocessed poultry was exhausted for the day but did not continue thereafter. The supply of poultry varied from day to day with the result that employees were sometimes released prior to receiving an afternoon break.

The negotiators discussed breaks throughout the day without resolving the matter. None of the bargaining conduct indicates bad faith.

At the end of the day session they expected to continue the next day. But, after the daytime session ended, Partee notified the parties of an emergency preventing his attendance the next day. Instead they immediately resumed negotiations during the evening of May 1. The parties were joined by mediator Tolbart and for the first time by a second mediator, Robert Smith.[6] Both mediators sought to identify and narrow the issues, Tolbart meeting separtately with the Company and Smith with the Union. From then on all bargaining sessions except the last one on June 5 were conducted with the parties being separated and with communication through mediator Smith. On May 1 Smith asked Levine to indentify the issues which needed to be resolved before agreement could be reached and specifically if he (Smith) could talk

[6] In his testimony Levine placed the sequence described here as occurring on May 15, but he was unsure. I find, based on the credited testimony of Joe Sanderson Jr., that the described sequence occurred May 1.

with the local committee members in this regard. Levine agreed and allowed local committee members to voice those matters uppermost in their minds. By allowing this procedure Levine implicitly focused on those matters as being high priority matters among the union issues. And he further allowed Smith to get the impression, although Levine did not specifically say so, that solution of those problems would likely result in a contract. On this basis Smith listened and made notes of 18 items requiring agreement. Company negotiators did not learn of this list of priority items until a company caucus on the morning of May 15 when Smith orally submitted the items to them.

The company position on May 1, expressed to the Union through the mediators, was that too many union proposals still remained on the table for the Company to be able to respond. Partee asked that the Union narrow the issues. Levine countered that the Union needed some idea of company views, but had none, and needed some idea of company views before further narrowing the issues. Both sides then retreated to earlier general positions. Partee expressed a desire to negotiate on the real problems rather than cosmetic contract changes. But when Levine asked him for specific proposals, he proposed the text of the old contract. The evening session ended on this note with no apparent progress toward agreement.

11. The 10th session—May 15

Breaks. The May 15 meeting opened in the morning with a discussion of Levine's proposal on breaks made on May 1. Partee expressed disagreement with certain language used and submitted a written counterproposal with different language. After a discussion between the parties, the union committee caucused separately to consider the counterproposal. During the union causcus, Levine drafted two new written proposals, one relating to breaks and the other to plant rules, which mediator Smith delivered to the company negotiators. Levine's proposal on breaks was not in the form of contract language, but rather a statement of agreement to the company counterproposal on the condition that certain changes be made which would enlarge the breaks from 10 to 12 minutes, continue breaks for certain nonline employees, and improve the timing of afternoon breaks. At the same time Smith delivered Levine's two proposals, he also verbally conveyed to company negotiators the lists he had made of the so-called 18 points which included breaks and plant rules.

There ensued a discussion which encompassed past practice, as well as Partee's counterproposal and Levine's last proposal. Sanderson, speaking for the Company, expressed firm opposition to changes from past practice. This position included rejection of an assured afternoon break and of longer breaks because of an increase in cost. Probing by the mediator and Levine then revealed that the cost of existing 10-minute breaks had already been accounted for. Thus, the Company's position was largely specious because the union proposal would have involved only a modest increase in cost. But Sanderson remained adamant in rejecting any change from past practice. No agreement was reached.

The Company's bargaining on breaks thus revealed an inflexible attitude which, when evaluated with the largely unfounded cost argument, evidenced unwillingness to reach agreement on that issue. *NLRB v. Truitt Mfg. Co.*, supra; *Tower Hoisery Mills*, supra.

The 18 Points. These were notes that mediator Smith had made May 1 on matters of prime concern to local committee members.[7] Smith told company negotiators that resolution of the problems on those subjects was what was needed to get an agreement. On questioning by Partee as to whether agreement on the indicated topics was all that was needed, Smith stated that Levine had assured him that whatever the union committee wanted would suit him fine. I infer he referred to comments of Levine on May 1 when Smith talked to the committee. Other than this apprising of company negotiators of the 18 points and of Levine's purported comment, there appears to have been no communication on May 15 between the parties respecting the 18 points.

Plant Rules. During the afternoon of May 15, the discussion turned to the work-rules language drafted by Levine in the morning which would permit the Company to make and enforce reasonable work rules, after due notice to the Union, and to employees and provided that the reasonableness could be tested through grievance and arbitration. The discussion included consideration of the old management-rights provision on which Partee continued to insist and under which the mere promulgation of work rules was not subject to grievance and arbitration.

Levine's proposal and bargaining position was premised on the contention that, under the old contract, the reasonableness of a plant rule could not be tested in any circumstance. The record, as a whole, indicates that, under past practice, the reasonableness of a plant rule was legally open to question in the context of a specific situation being grieved and arbitrated. The effect of Levine's plant rules proposal, together with his proposed (as well as the old) grievance and arbitration provisions, would have been to allow the Union to test by grievance and arbitration the general reasonableness of a rule when promulgated as well as thereafter in the context of a specific grievance controversy.

Partee argued for the old system, and Levine for his erroneously premised proposal. No agreement was reached. I find no evidence of company bad faith in its bargaining conduct on this issue during the May 15 session.

12. The 11th session—May 16

On May 16, the parties began by meeting separately at the suggestion of Smith. He told the company committee that Levine, contrary to what he had earlier understood,

[7] The subjects involved were absentee policy, vacations, job status on return from leave of absence, paycheck distribution, funeral leave, days before and after holidays, grieving of plant rules, distribution of warning letters and removal of old ones, sharpening of plant knives, personal and emergency telephone calls, breaks after 10 hours work, pay for duty on safety committee, overtime roster, pay protection for senior employees over new hires, right to bid on old job after reassignment, wages, overtime and jury pay, and accident and health benefits.

was enlarging the issues beyond the 18 points and, until the issues were narrowed, he saw no point in the parties meeting together. The difficulties of the bargaining situation are demonstrated by Levine's own testimony that he did not consider they had resolved the restroom issue even though they had agreed on May 1 to contract language governing that topic.

Having informed the company representatives on May 15 about the 18 points, and having been questioned by a skeptical Partee as to whether development of the list truly constituted a narrowing of the issues, Smith, on May 16, went back to the Union with the question whether the Union was dropping all other issues. Levine told him no, that the Union was only itemizing the most important issues. Thus, Levine reaffirmed that the 18 topics were top priority issues for the Union. Smith then reported to the Company and later returned to the Union, reporting that the Company understood the union position on the 18 points and needed time in which to respond to them.

At that time Levine, through Smith, made a written request for information from the Company on health and safety statistics, plant accident rates, and Equal Employment charges. At the next meeting, June 4, the Company supplied the requested information.

13. The 12th session—June 4

Little occurred on June 4 because mediator Smith did not arrive until late afternoon. He then met first with the company committee, telling them he was going to inquire of the union representatives whether there were any changes in union positions, any clarifications, or any reduction or narrowing of the issues. He subsequently reported back to the Company that he could not get Levine to state that only the 18 points were on the table, that there appeared to be other things as well that barred agreement.

At his suggestion, the parties agreed to a meeting of Smith, Partee, Joe Sanderson Jr., and Levine without the presence of the local committee so that Levine alone could hear the company response on the 18 points. This meeting was scheduled for the following day, June 5.

14. The 13th session—June 5

This was the last bargaining session held. Levine wanted it "off the record," but Partee refused because of the pending unfair labor practice charges filed by the Union on May 29. Levine then agreed to proceed "on the record."

According to the credited testimony of Joe Sanderson Jr., Levine began the substantive discussion by stating that the Union considered the matter to be serious. The Union found the old contract reprehensible, that it contained language contained in no other union contract, that the Union could not represent the employees under such a contract, and it was not going to have such language in the next contract. He emphasized the union position by referring to the strike, to union efforts to organize another of the Company's plants, to steps taken to enlist assistance from another union representing company employees in another of its plants, to the Union's campaign to boycott company products, and to his intent to enlist the help of every government agency he could against the Company.

The ensuing discussion between Levine and Partee became heated and emotional. During the discussion Partee repeatedly referred to the 18 points to which he was prepared to respond and which, he said, were described to him by Smith as the issues barring agreement. Smith confirmed that understanding. Levine refused to adopt Smith's description. Instead he said to Smith, "I told you that if these [the 18 points] were agreed upon, other things would basically fall into line." I view the differences between the words of Smith and Levine as immaterial.

Partee asked that Levine identify the other issues beyond the 18 points. Levine refused unless the Company first responded to the 18 points. He also rejected Partee's suggestion that they go through the initial union proposal, point by point, to identify the areas currently in dispute. Partee then refused to respond to the 18 points without having the other outstanding issues identified.[8] The meeting ended on that note, with no positive results, when Levine walked out.

At the June 5 session, Levine shifted his focus back from one emphasizing priority of the 18 points of local interest to one where the initial proposals of Mills, for a contract substantially different from the prior contract, were pushed to center stage. Thus, the number of issues was again enlarged, and, in view of Levine's statement of what the Union considered serious, some basis existed for company negotiators to believe that the 18 points in reality lacked the priority previously attributed to them. Although the Company had no right to insist that the Union abandon issues of concern to it, it was plainly entitled to be informed with reasonable particularity what those issues currently were. In the circumstances the Union was in no position to insist on a response to the 18 points as a precondition to further discussion.

I find that company conduct on June 5 did not evidence bad-faith bargaining.

Smith and Levine left the June 5 meeting together. They agreed between themselves that it would be best to let matters cool off for a time and before Smith would schedule further bargaining sessions.

C. *The Decertification Petition*

Also on June 5, employee Lavenia Jordan filed a petition (15-RD-422) with Region 15 of the the Board seeking decertification of the Union as representative of the employees. On July 5 the Regional Director for Region 15 dismissed the petition on the ground that the Union's unfair labor practice charges against the Company, which are the basis of the present proceeding, had previously been filed on May 29, had administratively been determined to have merit, and would be the subject of a Board complaint against the Company. The Regional Director ruled that a question concerning representation of the employees could not be raised in those circum-

[8] I make no finding as to the nature of the Company's intended response to the 18 points, the record being devoid of evidence thereon.

stances. On July 13 the petitioner sought Board review of the Regional Director's dismissal of the petition and on August 14 the Board affirmed the Regional Director's dismissal of the petition.

D. *Company Withdrawal of Recognition from the Union and Unilateral Pay Raise*

About the end of July, Levine contacted mediator Smith and requested he arrange further bargaining sessions. Smith subsequently informed Levine he would attempt to schedule sessions for August 8 or 9. On August 7 he telephoned Levine that Partee refused to meet because the Company might withdraw recognition from the Union.

By letter of August 9 to Levine, which he received August 14, Partee, on behalf of the Company, withdrew recognition from the Union as representative of the employees. The stated grounds for withdrawal of recognition were: (1) the decertification petition, which had been dismissed because of blocking unfair labor practice charges, but should not have been because the charges lacked merit; and (2) company doubt as to the continuing majority status of the Union based on, (a) the number of employee signatures (377) filed as a showing of interest with the decertification petition, (b) dwindling employee support for the strike as indicated by fewer employees on the picket line, (c) union indifference to agreement shown by its refusal to reduce outstanding issues, and (d) union unwillingness on June 5 to state which issues were barring agreement.

I find none of these asserted grounds to be a valid basis for withdrawing recognition from an incumbent certified union whose status as majority representative is presumed to continue. *Celanese Corp.*, 95 NLRB 664 (1951). The filing of a decertification petition does not establish that employees do not support the union nor does employee signing of a showing of interest list establish their ultimate preference where such events occur as here, in the context of employer unfair labor practices. *Autoprod, Inc.*, 223 NLRB 773 (1976). Picket line inactivity may or may not result from a change of heart and, in any case, a change of view about a strike does not establish a change of view about union representation. The presumption of continued majority status of the union is not thereby rebutted. See *Salina Concrete Products*, 218 NLRB 496 (1975); *King Radio Corp.*, 208 NLRB 578, 583 (1974). Assuming, without finding, that the Union failed in its bargaining duty to the Company, it did not thereby forfeit its entitlement to its Board certification or the rights of employees to its representation.

In his letter of August 9, Partee also informed Levine that, on August 10, the Company would announce general pay increases at its Laurel plant which were already in effect in its other plants. The Company, in fact, did so without bargaining with the Union.

E. *Concluding Findings Regarding Company Bargaining*

Hard bargaining characterized the entire course of negotiations. At certain sessions, as already found, company conduct went beyond hard bargaining and indicated a purpose to avoid agreement. As early as the second session on February 20, the Company demonstrated inflexibility in failing to make any reasonable effort to reach agreement regarding grievance and arbitration procedures. And, by its shifting position during discussion of a possible extension of the expiring contract, it demonstrated that its bargaining generally was inflexible.

Again, at the fifth session on March 28, in discussing the grievance committee, the Company's sterile tactic of only criticizing the union proposal, without making any affirmative effort to deal with issue at hand, evidenced a purpose to avoid agreement. The Company had a duty to make a serious effort to reach common ground with the Union. *NLRB v. General Electric Co.*, 418 F.2d 736, 762 (2d Cir. 1969), cert. denied 397 U.S. 965.

On April 10, during the sixth session, company bargaining on management rights evidenced a tactic of surface bargaining for the purpose of avoiding agreement. Company rejection, without explanation, of a union proposal on compensation during the probationary period for new hires similarly evidence such surface bargaining.

At the seventh and eighth sessions, on April 18 and 19, company bargaining regarding restroom relief revealed an intransigent attitude and unwillingness to reach an agreement.

And, again on May 15, at the 10th session in its bargaining about regular breaks, its conduct evidenced unwillingness to reach agreement.

Although these demonstrated incidents of unwillingness to reach agreement did not involve all sessions or all issues, they did involve matters essential to agreement and therefore delayed and frustrated agreement. This was bad faith, surface bargaining. *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (1960).

Respondent argues that the Union, rather than the Company, engaged in bad-faith bargaining. Of course, union conduct is not the subject of this complaint, there being no allegations of union unfair labor practices. And, on those occasions in which the Company engaged in bargaining conduct which it is found herein evidenced bad-faith bargaining, no conduct of the Union necessitated that the Company act as it did. What might have been the course of negotiations, had the Company not failed in its bargaining duty on those occasions, is, of course, open to some speculation. What this record does establish is that, on those occasions found above, company conduct impeded and frustrated the bargaining process.

The defense founded on asserted failure of the Union to properly bargain thus comes down to a *tu quoque* argument that on other occasions (for example the June 5 session), the Union frustrated bargaining and, therefore, it would have made no difference even if the Company had, on all occasions, fulfilled its statutory duty. But, as already noted, it is possible that negotiations could have achieved an agreement if, at the times Respondent failed in its bargaining duties, it had, instead, fulfilled them. Absent a nexus between the asserted bad-faith bargaining of each party, I conclude that the Act does not contemplate that unlawful conduct of one justifies similar conduct of the other.

Finally, Respondent's withdrawal of recognition from the Union and unilateral institution of raises, without bargaining with the Union, were the final phase of an apparent strategy. This strategy began with avoiding agreement by inflexibility and surface bargaining and was further advanced by its inviting a strike which, if in the resultant test of economic strength it won, would inevitably force dependent employees to abandon the strike, and finally arguably support the company claim that the Union could no longer lawfully represent the employees. Thus, the end result of the strategy could be company freedom from the strictures of union representation. Such stategy, however, does not satisfy Respondent's bargaining obligations under the Act because it was a device for profiting from its own unfair labor practices. See *Neely's Car Clinic*, 242 NLRB 335 (1979).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

Respondent's unfair labor practices set forth in section III, above, occurring in connection with its operations described in section I, above, have a close and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. All production and maintenance employees of Respondent at its Laurel, Mississippi poultry processing and rendering plant, including shipping and receiving employees and cafeteria employees, but excluding all office clerical employees, salesmen, over-the-road truckdrivers, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
3. The Union and the Local are labor organizations within the meaning of Section 2(5) of the Act.
4. At all times since June 9, 1972, the Union has been the representative for purposes of collective bargaining of a majority of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
5. Commencing February 20, 1979, and until June 5, 1979, Respondent negotiated with the Union without an intention of entering into a final or binding collective-bargaining agreement, and, in so doing, failed to bargain with the Union in good faith, and thereby engaged in and continues to engage in unfair labor practices with the meaning of Section 8(a)(1) and (5) of the Act.
6. On February 27, 1979, employees of Respondent in the aforesaid bargaining unit ceased work concertedly and began a strike which continues and was in part caused by and has been prolonged by the aforesaid unfair labor practices.
7. By withdrawing recognition from the Union on August 9, 1979 and thereafter refusing to recognize and bargain with the Union, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
8. By announcing on August 10, 1979 and by implementing on August 12, 1979, a 20-cent-per-hour across-the-board wage increase affecting employees in the aforesaid appropriate unit without affording the Union an opportunity to negotiate and bargain as the exclusive representative of employees in the unit, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom, post appropriate notices, and take certain affirmative action designed to effectuate the purposes and policies of the Act, including, upon request, bargaining in good faith with the Union, and reinstatement of unfair labor practice strikers upon their unconditional offer to return to work. Reinstatement shall mean reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges. They are to be made whole for any loss of earnings they may suffer as a result of Respondent's refusal, if any, to reinstate them in a timely fashion, by paying to each of them a sum of money equal to that which each would have earned as wages during the period commencing 5 days after the date on which each unconditionally offers to return to work to the date of Respondent's offer of reinstatement less any net earnings during such period, with interest theron to be computed in accordance with the formula *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]